FIRST SESSION—TWENTY-SECOND PARLIAMENT
1953-54

Joint Committee of the Senate and the House of Commons

ON

CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES

Joint Chairmen:—The Honourable Senator Salter A. Hayden

and

Mr. Don F. Brown, M.P.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 10

TUESDAY, MAY 4, 1954

WITNESSES:

Representing The Canadian Welfare Council:

Mr. Norman Borins, Q.C., Toronto; Dr. Alastair William MacLeod, Professor of Psychiatry, Montreal; Rev. D. B. Macdonald, Chairman, Delinquency and Crime Division, Ottawa; and Mr. W. T. McGrath, Secretary, Delinquency and Crime Division, Ottawa.

Appendix: Exchange of Correspondence with Erle Stanley Gardner of "The Court of Last Resort".

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1954.

COMMITTEE MEMBERSHIP

For the Senate (10)

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Hon. Elie Beauregard
Hon. Paul Henri Bouffard
Hon. John W. de B. Farris
Hon. Muriel McQueen Fergusson
Hon. Salter A. Hayden (*Joint Chairman*)
Hon. Nancy Hodges
Hon. John A. McDonald
Hon. Arthur W. Roebuck
Hon. Clarence Joseph Veniot

For the House of Commons (17)

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Mr. H. J. Murphy
Mr. F. D. Shaw
Mrs. Ann Shipley
Mr. Ross Thatcher
Mr. Phillippe Valois
Mr. H. E. Winch

A. Small,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, May 4, 1954

The Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries met at 11.00 a.m., 2.00 p.m., and 3.00 p.m. The Joint Chairman, Mr. Don. F. Brown, presided.

Present:

The Senate: The Honourable Senators Beauregard, Fergusson, Hodges, and Veniot.—(4).

The House of Commons: Messrs. Boisvert, Brown (*Brantford*), Brown (*Essex West*), Fairey, Fulton, Garson, Shaw, Shipley (Mrs.), Thatcher, Valois, and Winch.—(11).

In attendance:

Representing The Canadian Welfare Council (Delinquency and Crime Division):

Mr. Norman Borins, Q.C., Toronto;

Dr. Alastair William MacLeod, Professor of Psychiatry, Montreal;

Rev. D. B. Macdonald, Chairman, Delinquency and Crime Division; and

Mr. W. T. McGrath, Secretary, Delinquency and Crime Division.

Counsel to the Committee: Mr. D. G. Blair.

On motion of Mr. Shaw, seconded by Mr. Brown (*Brantford*), the Honourable Senator Nancy Hodges was elected to act for the day on behalf of the Joint Chairman representing the Senate due to his unavoidable absence.

On motion of Mrs. Shipley, seconded by the Honourable Senator Fergusson,

Ordered,—That the Clerk of the Committee obtain as soon as possible, as recommended by the Subcommittee on Agenda and Procedure, 50 copies of an offprint from a forthcoming issue of the Canadian Bar Review containing the symposium of the Open Forum on Capital Punishment held by the Ontario Branch of the Canadian Bar Association in Toronto in February, 1954, for the use of members of the Committee.

On motion of Mr. Winch, seconded by Mr. Thatcher,

Ordered,—That, as recommended by the Subcommittee on Agenda and Procedure, the letter from Erle Stanley Gardner dated April 20, respecting U.S.A. murder cases where innocence was established after pronouncement of sentence, be printed, with his consent, as an Appendix to today's Minutes of Proceedings and Evidence and that copies be released to the Press together with the letter addressed to him on April 8. (*See Appendix*).

The Presiding Chairman introduced the delegation from The Canadian Welfare Council.

Reverend Macdonald outlined the functions of each delegate in respect of the Council's hearing.

Mr. Borins presented the brief of The Canadian Welfare Council favouring eventual abolition of the death penalty (which was "taken as read" in accordance with the procedure adopted by the Committee on March 2), and made a supplementary oral presentation thereto.

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Mr. McGrath described the organization, functions, and activities of The Canadian Welfare Council.

Dr. MacLeod made an oral presentation on the sociological effects of capital punishment based on experiences gained from psychiatric treatment of criminals.

During the course of their presentations made at the morning and afternoon sittings, the delegates from The Canadian Welfare Council were questioned thereon.

On request of Counsel to the Committee, it was agreed that Mr. Borins would supply from his files a record of references to abolitionist countries where it would indicate that capital punishment does not deter murder any more than any other forms of punishment.

Reverend Macdonald presented a copy of a sermon he delivered on capital punishment, with reference to which it was agreed that it be referred to the Subcommittee on Agenda and Procedure.

On behalf of the Committee, the Presiding Chairman thanked the delegation of The Canadian Welfare Council for their presentations on capital punishment.

At 3.30 p.m., the Committee adjourned to meet again as scheduled at 4.00 p.m., Wednesday, May 5, 1954.

A. SMALL,
Clerk of the Committee.

EVIDENCE

TUESDAY, May 4, 1954.
11.00 a.m.

The PRESIDING CHAIRMAN (*Mr. Brown, Essex West*): Ladies and gentlemen, if you will come to order, please, a motion will be entertained to elect an acting joint chairman from the Senate for the day.

Mr. SHAW: I would move that Senator Hodges act as joint chairman for the day.

Seconded by Mr. Brown (*Brantford*). Carried.

The PRESIDING CHAIRMAN: Senator Hodges will you please come forward.
(Senator Hodges assumed the chair as acting co-chairman.)

The PRESIDING CHAIRMAN: The following motion will now be entertained: moved by Mrs. Shipley, seconded by Senator Fergusson, That the clerk of the committee obtain as soon as possible, as recommended by the sub-committee on agenda and procedure, 50 copies of an offprint from a forthcoming issue of the Canadian Bar Review containing the symposium of the Open Forum on capital punishment held by the Ontario Branch of the Canadian Bar Association in Toronto in February, 1954, for the use of members of the committee.
All in favour. Carried.

And, also: That, as recommended by the subcommittee on agenda and procedure, the letter from Erle Stanley Gardner dated April 20, respecting U.S.A. murder cases where innocence was established after pronouncement of sentence, be printed, with his consent, as an appendix to today's minutes of proceedings and evidence and that copies be released to the press together with the letter addressed to him on April 8.

Moved by Mr. Winch, seconded by Mr. Thatcher. Carried.
(*See Appendix*)

The PRESIDING CHAIRMAN: Now, ladies and gentlemen, we have with us today the Canadian Welfare Council. We are pleased to have the Rev. D. B. Macdonald, chairman of the Delinquency and Crime Division of the Canadian Welfare Council, Mr. Norman Borins, Q.C., Dr. Alastair William MacLeod, Assistant Professor, Department of Psychiatry, at McGill University, Montreal, and Mr. W. T. McGrath who is secretary of the Delinquency and Crime Division of the Canadian Welfare Council.
You have the brief before you on the question of capital punishment. Which of the gentlemen is the spokesman?

Rev. Mr. MACDONALD: May I say a few words. Mr. Borins is going to present our brief. He was Assistant Crown Prosecutor of York county for eleven years, and for the past seven years has been in private practice, and in addition to dealing with portions of our brief Mr. Borins will be available to answer questions on procedure in court trials. Dr. MacLeod is Assistant Director of the Mental Hygiene Institute of Montreal, Assistant Professor of the Department of Psychiatry at McGill, and he has had extensive experience in experimental psychiatric treatment in England, and is secretary of the Canadian Institute for the Study and Treatment of Delinquency. Mr. McGrath is secretary of the Delinquency and Crime Division of the Canadian Welfare Council. I am going to ask Mr. Borins to make the presentation, with your permission, Mr. Chairman.

The PRESIDING CHAIRMAN: You will not be reading the brief in full, Mr. Borins?

Mr. BORINS: No.

The PRESIDING CHAIRMAN: The brief will be inserted at this point. If you will make comment on the brief we will appreciate it and then you may submit yourself for questioning by the committee if that is in order. However, I do not want to interfere with your method of procedure.

Mr. Norman Borins, Q.C., called:

The WITNESS:

On the retention of the death penalty as a punishment under the provisions of the Criminal Code

The Canadian Welfare Council favours the eventual abolition of the death penalty. We agree that a thorough study of the matter is required before a decision based on fact and in line with the wishes of the Canadian people can be reached, and we commend the federal government for setting up a joint committee of the Senate and House of Commons to carry out such a study. We appreciate the opportunity to present our recommendations and to set out the considerations that have led us to the conclusion that the abolition of capital punishment is desirable.

We are of the opinion that the first step in such a study should be an examination of the basic philosophy and concepts that underlie our treatment of the criminal. We consider it essential that such philosophy be clearly understood and clearly stated before an attempt is made to frame the provisions of our criminal law. Until agreement is reached on the purpose to be accomplished there cannot be agreement on the details of the Criminal Code.

The responsibility for crime does not rest with the individual criminal alone. In many of its aspects crime is not so much an aberration of the individual as a group phenomenon, and the social group is, to a large extent, the source of the crime problem. Crime should be regarded as a symptom of an underlying social disease and the individual criminal should be regarded as the weak spot where the disease breaks through. The social disease may manifest itself in other ways besides crime, for instance as mental illness, and we should look upon crime in much the same way we look upon those other manifestations of an imperfect society.

In many ways the criminal is the product of his environment. Throughout his childhood, in fact throughout his life, he is influenced by pressures from the community in which he lives, from his associates, and, most of all, from the members of his family. If this environment is favourable, it is relatively easy for him to make a good adjustment; if the environment is not favourable, the adjustment is more difficult. The failure to provide the kind of environment which leads to an acceptable adjustment on the part of the individual rests with the community as a whole.

We recognize that some forms of punishment must be retained as long as our community is unable to cope with the fundamental causes of crime, but far from feeling a sense of satisfaction that the wrongdoer has suffered his just deserts, every member of the community should have a deep feeling of remorse and failure, and should work towards the end that such a situation should not repeat itself.

Such an attitude would make the retention of any form of vindictive punishment impossible. Vengeance has no place in our criminal law. We believe that punishment of the offender can be justified only so far as it (a) deters potential offenders or (b) reforms the individual offender.

We believe, further, that the social scientists, particularly the sociologists, anthropologists, and psychiatrists, have collected valuable information regarding the causation of crime and the treatment of the offender, and that this information should be given careful consideration. It is not desirable to rely entirely on the opinions of individuals who have only personal experience to guide them.

How we deal with murderers takes on an enhanced importance because this matter has become in many respects a test case of the extent to which we are able to accept these concepts of crime. If we are able to look at the murderer objectively and with some understanding of the factors that have contributed to his being a murderer, we should be able to look at offenders guilty of lesser offences with similar objectivity.

The Joint Commission on Revision of the Criminal Code has before it a great bulk of evidence, statistical and otherwise, dealing with capital punishment, and it seems unnecessary to burden the commission members with further detailed documentation. We are therefore giving only in brief form the considerations that have led us to our opinion.

When the above tests are applied to the use of capital punishment, it is clear that it cannot be justified on the grounds that it reforms the individual offender. He can be reformed only if he remains alive.

The question whether the death penalty deters potential offenders is a difficult one to answer. However, the social scientists have been unable to find evidence of any special deterrent value to the death penalty. Most of the West European and South and Central American countries, and six of the United States have abolished the death penalty, some a century ago, and statistics for those areas show no increase in the murder rate after the abolition of the death penalty. To quote from the report of the Royal Commission on Capital Punishment of Great Britain:

> We recognize that it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty, or indeed of any form of punishment. The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty.

The belief is often expressed that by retaining death as the penalty for murder, society expresses its abhorrence of the act in the strongest possible terms and that members of the community are deterred from committing the crime because its enormity is thus stressed. We doubt that society's disapproval has much effect on the potential murderer. We believe rather that the brutalizing presence of the death penalty among us tends to strengthen those factors which bring about murder and crime in general. We believe that murder is less likely in a wholesome social atmosphere than in an atmosphere fouled by the morbidity, melodrama and horror associated with executions.

Experience with the abolition of the death penalty in connection with crimes other than murder would indicate there is no risk involved in abolition. In England in 1780 there were 350 separate crimes punishable by the death

penalty. In 1810, Sir Samuel Romilly introduced a bill in the British parliament to abolish capital punishment for stealing five shillings or more from a shop. Speaking in opposition to the bill in the House of Lords, Lord Ellenborough, Chief Justice of the King's Bench, predicted that the repeal of this law would lead to the abolition of the death penalty for stealing five shillings from a dwelling, in which case no man could "trust himself for an hour without the most alarming apprehensions that, on his return, every vestige of his property will be swept away by the hardened robber." Gradually, however, through the years, the number of crimes punishable by death has been reduced without a corresponding increase in the rate of crime. As society became more stable, the crime rate dropped for reasons in no way connected with punishment.

Some thought about the individual murderer will offer further indications that the death penalty does not deter. Murderers might be classed arbitrarily into three groups—the insane killer, the person who kills impulsively while in the grip of an uncontrollable passion, and the deliberate killer who murders for gain. It is hard to see which of these three groups would be influenced by the fear of the death penalty. The insane killer has no control over his actions, and neither has the person who is in the grip of an uncontrollable passion. The deliberate killer does not expect to get caught. Whether he is executed or sentenced to life in prison, the murder proves unprofitable if he is brought to justice.

There are also indications that juries hesitate to bring in a verdict of guilty when there is a risk of a death penalty. The following quotation is from an article by Professor C. W. Topping, The Death Penalty in Canada, published in the Annals of the American Academy of Political and Social Science for November 1952:

> It seems clear that there is an inverse relationship between severity of punishment and certainty of punishment, and that Canadians are suffering under a delusion when they assert that they know how to hang. The net result of the administration of justice in Canada as it relates to capital offences is that murder has become the least risky of any or all the offences which a citizen might choose to commit.

Professor Topping presents statistics on the rate of conviction of persons accused of murder, as contrasted to other crimes, to support his statement.

It also appears that the basic principles of our judicial system are set aside in the case of the convicted murderer. There were 172 people convicted of murder in Canada in the ten-year period 1942-51, and the court had no choice but to pass the death sentence. The decision on what should happen to the murderer rested with the cabinet. During this same period there were 40 commutations. The prerogative of mercy must be maintained to provide for the exceptional case, but it is difficult to maintain that it is being used only in exceptional circumstances when it was invoked in 25 per cent of the cases. This means that not only the freedom of the individual but his very life is in the hands of the administration. There should be no limitation on the prerogative of mercy, but the cabinet should not be put in the position of making routine decrees that should rest with the court. The fact that interference with the court's sentence was thought necessary in such a large proportion of the cases emphasizes that an automatic death sentence in connection with murder is not acceptable, and that each case must be considered individually.

There is also the risk of error. There are a number of instances on record *in countries other than Canada* where innocent people have been executed. The recent cases of Ronald Powers who served ten months and Paul Cachia who served twenty-eight months, both for robberies they did not commit,

illustrate that miscarriages of justice do occur in Canada. Had a murder occurred in connection with these robberies, it is probable that these two men would have been executed before the error was established. If the convicted person is sentenced to prison and the error is uncovered later, something can be done to rectify the situation. Once an execution has taken place, nothing can be done.

The sensationalism that attends both a murder trial and the execution of a condemned person has an undesirable effect on the community. Children and even adults are fascinated by the drama of a person on trial for his life, a fascination which is not nearly so strong in connection with crimes where the death penalty is not involved. One result is that the murderer often goes to his death with the maudlin sympathy of a large part of the public. This in turn cheapens the law in the eyes of the community. There is little dignity or majesty in the public's view of a murder trial.

There are other arguments in favour of abolition of the death penalty. One is the religious and moral argument of the sanctity of human life. Are we justified in setting aside our religious and moral principles against taking human life even in the case of punishing the murderer?

Another argument which might be brought forward against the retention of the death penalty is the horror of the experience for the family of the executed person. To have a relative convicted of murder and sentenced to life imprisonment is difficult enough, but the experience of hanging can affect relatives for life, particularly the children. The hanging of the guilty person in no way helps the family of the person who was murdered.

Other arguments have to do with good prison personnel. Highly qualified staff is being recruited for our prison services, and it would be unfortunate if this development were curtailed because potential staff refused to take employment in a service where they might be asked to supervise or participate in an execution.

However, the Canadian Welfare Council is aware that a large body of thoughtful and humanitarian public opinion in Canada has misgivings about the effect of the complete abolition of capital punishment. Some think there may be a deterrent effect to a death penalty and that until we have found a way to remove the causes of crime this deterrence may be necessary. Some feel that as our society becomes more stable the danger involved in abolition may lessen and that the question is essentially one of when abolition should take place. Still another reason for these misgiving is the fact that our treatment services have not yet reached the peak of excellence that seems desirable and this raises the question of what would happen to the murderer if no means of dealing with him, except imprisonment, were available.

After considering the above arguments, and recognizing the necessity of keeping legislation in line with public opinion, the Canadian Welfare Council expresses approval of the abolition of the death penalty in principle, and recommends, as a first step, the abolition of the mandatory death sentence.

One good result of this would be to put the responsibility of deciding whether the death penalty should be imposed in a specific case either on the judge or on the jury. The Royal Commission on Capital Punishment in Great Britain felt this was too great a burden to place on one person, and recommended that the responsibility rest with the jury. We do not have a recommendation to offer on this problem. However, if discretion is left to the jury, we feel strongly that a majority decision should be sufficient, and that it should not be necessary for the jury to reach a unanimous verdict in recommending that the death penalty should not apply in a particular case. This is a matter of the expression of public opinion, and a majority vote of the jury

should be sufficient. If a unanimous vote is required, it would mean that one member of the jury could send the convicted murderer to his death against the opinion of the other eleven members of the jury.

We believe that the adoption of this recommendation would lead to a gradual reduction in the use of capital punishment, and provide an opportunity to note the effects on the rate of murder. We are fully confident that before too many years have passed the desired goal—complete abolition of the death penalty—would prove feasible.

The Canadian Welfare Council
245 Cooper Street
Ottawa 4, Ontario.

The WITNESS: I am quite prepared that the brief be taken as read, but perhaps I might read part of it:

> The Canadian Welfare Council favours the eventual abolition of the death penalty. We agree that a thorough study of the matter is required before a decision based on fact and in line with the wishes of the Canadian people can be reached, and we commend the federal government for setting up a joint committee of the Senate and House of Commons to carry out such a study. We appreciate the opportunity to present our recommendations and to set out the considerations that have led us to the conclusion that the abolition of capital punishment is desirable.

Now, turning to page 10 of the brief I just want to refer to the concluding paragraphs:

> After considering the above arguments, and recognizing the necessity of keeping legislation in line with public opinion, the Canadian Welfare Council expresses approval of the abolition of the death penalty in principle, and recommends, as a first step, the abolition of the mandatory death sentence.
>
> One good result of this would be to put the responsibility of deciding whether the death penalty should be imposed in a specific case either on the judge or on the jury. The Royal Commission on Capital Punishment in Great Britain felt this was too great a burden to place on one person, and recommended that the responsibility rest with the jury. We do not have a recommendation to offer on this problem. However, if discretion is left to the jury, we feel strongly that a majority decision should be sufficient, and that it should not be necessary for the jury to reach a unanimous verdict in recommending that the death penalty should not apply in a particular case. This is a matter of the expression of public opinion, and a majority vote of the jury should be sufficient. If a unanimous vote is required, it would mean that one member of the jury could send the convicted murderer to his death against the opinion of the other eleven members of the jury.

May I here intercede with my own recommendation as to how the matter should be dealt with in the event that only the mandatory feature of punishment should be abolished. My own conclusion is that the procedure that would be most feasible would be that nothing be said to the jury by either Crown counsel or defence counsel in summing up their case, nor by the presiding judge in his charge to the jury about the question of punishment or about any recommendation for leniency. In other words, to retain the same practice as we have it now; but once a verdict is returned I would personally recommend this procedure, that the presiding judge then charge the jury on the matter of a punishment and that the law be so amended that the jury should then be

burdened with the problem of deciding on punishment. In this way: that they leave the courtroom and again retire to the jury room to deliberate on the matter of punishment and they should be free to come back with a recommendation of leniency, and in the event that such a recommendation is brought back then that should have the effect of removing the mandate to the judge so that he then becomes free to pass any sentence up to life imprisonment.

You will note that in the brief the Canadian Welfare Council merely makes the recommendation as a first step, the abolition of the mandatory death sentence but they say: "we do not have a recommendation to offer on this problem." Namely, they have no suggestion as to the procedure. What I have just suggested as procedure is something that has occurred to me.

I now return to the brief and read the concluding paragraph on page 11:

> We believe that the adoption of this recommendation would lead to a gradual reduction in the use of capital punishment, and provide an opportunity to note the effects on the rate of murder. We are fully confident that before too many years have passed the desired goal—complete abolition of the death penalty—would prove feasible.

In other words, while the Canadian Welfare Council favours the eventual abolition of the death penalty, we are suggesting a compromise at the present time.

Now, that is the only reference I wish to make to the brief, because I think it would be taking up time unnecessarily to read the entire brief. I do, however, now wish to make certain remarks of my own, Mr. Chairman, and whatever I may say I do not think in fairness to the Council, should be attributed to the Council because I am only authorized to give the committee on behalf of the Council what is stated in the brief. Those of you who have read the English report of the Royal Commission on capital punishment, 1949-1953, will realize that my remarks are based to a very great extent on recommendations and findings by that commission and a good deal of it is quoted.

Now, for murder in so far as our law is concerned the penalty, of course, is mandatory, yet perhaps there is no single class of offences that vary so widely, both in character and in culpability as the class comprising those which may fall within the comprehensive law definition of murder. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children; they may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane, and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of the passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. One crime may be committed in order to carry out another crime, or in the course of committing it or to secure escape after its commission; murderous intent may be unmistakable or it may be absent, or death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the most base and some of the better emotions of mankind, cuoidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self righteousness, political fanaticism or there may be no intelligible motive at all. Our law, in spite of all that, is not flexible at all. Our law of insanity defences is the law as established by the M' Naghten Rules in 1843. They have not been enlarged. The Royal Commission in England recommended abolition of the Rules. Certainly in my opinion they need to be enlarged and modified to be consistent with the progress made in psychiatry in recent years. Our law still reflects the concept of an earlier age that every murderer forfeits his life because he has taken another life. This rigidity is the outstanding

defect of our law of murder. The work of this honourable committee, therefore, is linked with the work of the Royal Commission who will study the law pertaining to the defence of insanity and I suppose that collaboration will be desirable and essential. The necessity for abolishing capital punishment may not be so apparent if there is enlargement in the insanity law or modification and distinction made in the various types of murder I have referred to.

The PRESIDING CHAIRMAN: I do not like to interrupt you but I think we should point out at this time that so far as the question of defence of insanity is concerned that is now before a Royal Commission of which Mr. Justice McRuer is chairman, and not before this committee.

The WITNESS: I understand that. I was just merely touching that.

The PRESIDING CHAIRMAN: I thought we should make that clear for the purpose of the record.

The WITNESS: Now, if there is enlargement of the insanity law—if some of the matters of law that I will be touching on are changed—if that is done it may be suggested by some that the desirability of abolishing capital punishment disappears, or the mandatory feature of the sentence may disappear. It may be that in practice the inflexilibity of law and some of the problems I have referred to are taken care of by the exercise of the prerogative of the cabinets of government; that is executive clemency. While I feel that such a prerogative should never be taken away, this method does not cure the ills I spoke of, that is the rigidity of the insanity laws and the laws of provocation. The decision of the cabinet is not, perhaps, always the correct one. The review of the cabinet may not always detect the lack of premeditation or a deteriorated mind or the other things I have referred to.

It is commonly said that punishment has three principal purposes and they are referred to in the brief that has been filed with this committee: namely, retribution, deterrence, and reformation. I think that in so far as number one and number three are concerned, they can be disposed of very quickly. There is something wrong, it seems to me, in the state marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offence. Modern penological thought discounts retribution as one phase of vengeance. Now, if I am permitted to, Mr. Chairman, I would like to read a portion of a paper delivered by Rabbi Abraham L. Feinberg of Holy Blossom Temple, Toronto, at the panel discussion of the Ontario Bar Association which you referred to this morning, and I read this perhaps with great respect to the chairman of our committee, the Reverend Mr. Macdonald, as I did not know that he delivered a very excellent sermon on the entire matter which received wide publicity here in Ottawa, and I think that perhaps it should be suggested that a copy of Reverend Mr. Macdonald's sermon be put in.

Dealing with the one matter that is often referred to as one of the purposes of capital punishment, namely retribution, I thought I could do no better than to read a portion from a paper delivered by Rabbi Abraham L. Feinberg which is as follows:

> The state is a moral being subject to the same imperatives as the individual. Once the Canadian people begin to regard the state as an impersonal, inhuman, monolith apart from themselves, the state ceases to be a servant and becomes the master—and we are psychologically on the road to totalitarianism.
>
> When one is hanged the Canadian citizens hire, pay, and give the hangman status as their representative. It is a grim exercise of conscience, and a necessary lesson in government, for all of us to realize that the execution of a criminal is not a sensationalized spectacle to be read about and witnessed, but a calculated act wherein every citizen participates.

The very essence of democracy is the principle that the state is the people, and that, like them, it must obey a higher law.

This truth has special meaning today, when our civilization is challenged by communism. In contrast to the amorality of the Soviet state, which acknowledges no sovereignty except its own power and deals with entire populations as mere instruments of strategy, the western democracies claim that they are identified with ethics and religion, believers in, and responsible to God.

What is the basic law of God on earth—if not the absolute inviolability and supremacy of human life? The root whence everything of value grows in our society is respect for life, as a sacred gift conferred and withdrawn by God alone. If any real progress has been made by mankind in the pursuit of peace and justice, it is because this seminal concept, the holiness of life, has been more widely understood and implemented. Even war, once a routine and vaunted activity of nations, must now be proved necessary for self-defence—because the human race has developed a deeper respect for life. Capital punishment, once the penalty for many misdeeds, is now confined in nearly all cases to the crime of murder, the wilful destruction of another's life.

Will reverence for life be preserved by adding a deliberate, official, public killing to a killing that is ordinarily passionate, personal and private? Is the state above the obligation to hold life inviolable? Can the state teach its young to be moral by breaking the most crucial of all moral precepts?

I did not read it all.

I might say, Mr. Chairman, that I have quoted this portion of Rabbi Feinberg's paper with his permission. I did not decide to do so because I happen to be in his congregation but I do subscribe to everything he says certainly as far as the first part is concerned, namely retribution.

The only position which in my opinion carries justification is "deterrence" —but statistics confirm the suspicion that capital punishment achieves nothing that cannot be achieved by imprisonment. My personal experience is that the death penalty results in many verdicts of not guilty where the verdict should be one of guilty. I should not complain of that, but nevertheless that is my finding as a result of my personal experience. My personal belief is that far from being protective capital punishment is merely punitive in aim, primitive in form, negative in effect, and ultimately a peril to the moral fibre of our people and should be abolished. I go further than the recommendation by the Canadian Welfare Council. I believe that the reference to this committee is not confined to the issue alone of whether capital punishment should be retained or abolished but also to find some practical compromise between the present scope of the death penalty and its abolition. That I believe involves consideration and change in the law. I recommend to this committee the conclusions of the English Royal Commission which appears on page 213 in article 609. It is very brief and I will read it if I may Mr. Chairman. I will read 609:

We have examined every aspect of the existing law, practice and procedure relating to the scope and definition of murder, and to the treatment of persons charged with, or convicted of, murder, and have considered numerous proposals for amending them. We are agreed in recommending

(*a*) that the doctrine of constructive malice should be abolished;

(*b*) that "aiding or abetting suicide" should no longer be treated as murder, but should be made a substantive offence punishable with imprisonment for life or for any lesser term;

(c) that the law should be amended to enable a jury to return a verdict of manslaughter where they are satisfied that the accused was deprived of his self-control by provocation, and that a reasonable man might have been so deprived, notwithstanding that the provocation was by words alone;

(d) (by a majority) that the M'Naghten Rules should be abrogated, or, (with one dissentient) that, if they are retained, they should be enlarged to cover cases where the accused, as a result of insanity or mental deficiency, did not know the nature and quality of the act, or did not know that it was wrong; or was unable to prevent himself from committing it; and

(e) (by a majority) that the law should be amended to provide that the sentence of death should not be passed on any person convicted of murder who was under 21 years of age at the time of the commission of the offence.

These are not matters that I personally recommend myself, but I thought I might, with respect, recommend them to the committee for their consideration. I would stress certainly the abrogation of the M'Naghten Rules or the enlargement of the Rules, and an amendment to our law in so far as provocation is concerned. Those are my remarks, Mr. Chairman.

The PRESIDING CHAIRMAN: Thank you very much. As a matter of foundation for the committee, could we have someone tell us about the Canadian Welfare Council, how it is constituted and what its purposes are?

The WITNESS: Could I ask the secretary to do that.

Mr. MCGRATH: The Canadian Welfare Council is a national voluntary organization in the broad field of welfare. It covers the whole country and is voluntary in the sense that it is not a branch of government. It is made up of member agencies and member individuals. There are about 380 agencies which are members of the Canadian Welfare Council, some very large, some quite small, and I think at this stage there are something like 1300 individuals.

The types of agencies range from technical groups like the John Howard Societies and Training schools for delinquents, to bodies like service clubs, women's organizations and bodies of that nature having a general interest in welfare.

The Canadian Welfare Council is divided into four divisions. One is family and child welfare; one is the chests and councils, which deals with money raising aspects; one is public welfare, for big financial programs sponsored by the government; and then there is the delinquency and crime division which we represent.

However, the Canadian Welfare Council is controlled by a Board of Governors which is made up of representatives of all divisions and a matter of this nature is processed not by the division represented only but by the total membership. In this case it came from the delinquency and crime division and of course originated with us, but went to all divisions for discussion before it reached the stage of approval.

The PRESIDING CHAIRMAN: Are there any other members of the panel who would care to make any presentation.

Rev. Mr. MACDONALD: We feel that the committee might ask questions and we would be prepared to answer them.

The PRESIDING CHAIRMAN: That is in order. We will ask for questions starting with Mr. Valois.

By Mr. Valois:

Q. I notice that in your brief on page 8 it is submitted that: "the fact that interference with the court's sentence was thought necessary in such a large proportion of the cases emphasizes that an automatic death sentence in connection with murder is not acceptable, and that each case must be considered individually." I understand that is the opinion of the Canadian Welfare Council and they do not suggest any way. You have gone further than the council?—A. Yes, sir.

Q. You said that instead of having the death sentence that it should be left with the jury?—A. Yes, sir.

Q. Is it your opinion that the jury will be in a better position to exercise what we might call leniency than the cabinet in its executive capacity?—A. If that right were given to the jury it still would not take away the prerogative that exists with the cabinet to exercise executive clemency. In other words, the jury might refuse to bring in a recommendation of leniency and then there would be no alternative but for the judge to pass the death penalty. In other words, it would become mandatory again. The recommendation of leniency by the jury would have the effect of taking away the mandate so that the judge would not have to pass the death sentence. Should the jury not bring in that recommendation then the sentence is mandatory and then there is still the right to go to the cabinet.

Q. There is one point I will try to make. I may not make myself understood because English is not my own tongue. But, do you say that the verdict of the jury would have to be based solely on legal grounds. For instance, if the jury feels that there is provocation, instead of saying it is manslaughter they would say we recommend leniency so as to take away from the judge the duty of imposing death. Would the jury be confined to these reasons, or, for instance, could they go to the background of the accused on account of environment and so on that they feel leniency should be granted?—A. My recommendation would mean this: that the jury, to begin with, would still be free to bring in a verdict of guilty of manslaughter and not murder perhaps for the reason that there is extreme provocation, or perhaps for the reason that there is lack of evidence to establish a clear case of an intentional killing, or perhaps for the reason that there is a strong case established for the defence. If the jury brings in a verdict for those reasons of guilty of manslaughter then all the other procedure is not required. If they bring in a verdict of guilty on a charge of murder, then the judge would charge them all over again and say to them: "Now, gentlemen of the jury, with the change in the law you are now burdened with the task of dealing with the matter of punishment. Now you will go back to your jury room and consider all the facts of the matter of punishment and if you bring in a recommendation of leniency then I am no longer compelled to pass the death penalty". They will not be told all that until they find the verdict; then they will deliberate on the matter of punishment. The defence and the Crown would be free to adduce such evidence as would assist the jury.

Q. That is why I wanted to have your answer, because I felt that the jury might be handicapped because an investigation of the circumstances may be harder for a jury than for the cabinet who rely on reports from the police and the presiding judge and even the defence attorney. I am quite satisfied with that.—A. If I may add, I would say that I do not go so far as to say that we now have dishonest verdicts, although there may be or may not be. I do not want to make an issue of that, but with capital punishment there are often justifiable suggestions that the jury in order to stay away from the death penalty bring in a verdict of manslaughter. With the new procedure I think that the verdicts would be based more closely on the evidence because the people generally would soon get to know that there has been a change in the

law and that the jury would not worry when going into the jury room to deal with the question of murder or innocence that a verdict of guilty of murder is the end of it.

The PRESIDING CHAIRMAN: Have you any questions, Mr. Valois, which you would like to ask other members of the panel?

Mr. VALOIS: No.

The PRESIDING CHAIRMAN: I hope that the committee will feel free to direct any questions to any member of the panel.

By Mrs. Shipley:

Q. This committee has heard considerable evidence on the fairness—at least what I call the fairness—of our law. I for one was pleased to hear the provisions made for the protection and just trial of the prisoner. You, no doubt, are more familiar with that than even I, whereby a psychiatrist is available, the man is examined at any time during the trial or during the time he is being held for trial, and that adequate defence counsel is provided, and money is provided to bring witnesses for his defence, and so on. I am assuming that, and that it has gone to the Appeal Courts and the statement was made by Mr. Borins that it finally comes to the cabinet; all these things have taken place. Then, this morning you gave this statement: when the case has gone through all this procedure it arrives before the cabinet for consideration and you have said that the cabinet in its investigation may not detect certain mitigating circumstances. You cited the circumstances. I am at a loss to know where the weakness must exist; if after all this procedure and all of the provisions that are made for the prisoner, where is the weakness if by that time there are mitigating circumstances which have not been brought to the attention of the court or that the cabinet could not determine? Is it the fact that defence counsel is not adequate, or what is the cause?—A. Generally speaking in the matter of providing counsel, medical evidence, and the like, I suppose one must concede that the department of the attorney general in the various provinces are cooperating as much as they can possibly cooperate. But that cooperation may be inadequate. It is not inadequate deliberately, but it is nevertheless inadequate and they are not to be criticized for it, because if counsel is not an experienced counsel it is surely not the fault of the attorney general's department. But, you asked wherein does the fault lie. It may very well be that in these cases involving capital punishment as they do now, that quite often counsel is provided who is not experienced and when that happens there can be a great deal of fault. The inexperience of counsel can be quickly detected sometimes in the record of the trial. I can even think of illustrations I have seen in prosecution of cases where mistakes were being made, and wherever it was possible for me in a fair prosecution of the case I corrected some of them myself by assisting defence counsel, but it must be admitted that that is one of the faults.

Q. Would that be progressive to the provincial Appeal Courts and the Supreme Courts right up on to the cabinet? Would that never be corrected?—A. It ends with the trial because once the trial is over there is nothing left but a record, and when it goes to the Court of Appeal in the province there is only the record to deal with and if defence counsel submitted certain things or made improper submissions or incomplete submissions then that cannot be remedied by the Court of Appeal.

Q. It can be considered in a consideration by the Cabinet?—A. But not by the Court of Appeal because they must confine themselves to the record, likewise the Supreme Court of Canada.

Q. We have grand juries in Ontario who determine if the charge is a correct one and then, in making the statement that juries are loathe to bring in a guilty verdict because a man is to be hanged, if they do so, are you not

overlooking to some degree the fact that the jury has the power to reduce the charge and find the man guilty of manslaughter?—A. You mean first the grand jury?

Q. Yes.—A. The procedure with the grand jury is that a bill of indictment is presented and witnesses are called. There is no presiding judge.

Q. I meant the petit jury, the one that is at the trial. They have the power to bring in a manslaughter charge and reduce the charges at that stage?—A. Yes.

Q. Would that not offset what you stated?—A. They may do that in some cases, but they do not do it in all cases where they should.

Q. But, nevertheless, the right is theirs?—A. Yes, if properly charged by presiding judge.

Q. On page 8 of the brief you state: "there are a number of cases on record where innocent people have been executed." This committee has been endeavouring to find one case in Canada where there is proof that an innocent person has been executed, and we have been unable to do so. I wonder if this group would be good enough to give us the record of such cases as they had?—A. I can answer that in this way. I have read the presentation of Mr. Arthur Maloney and the references he has made would be the references we would make.

Q. Did he table specific cases?—A. I thought he had.

Mr. McGRATH: I think that the statement in the brief does not refer to Canada. It says there are a number of instances.

By Mrs. Shipley:

Q. Then, it has no particular bearing on a change in Canadian law unless it refers to cases in Canada.—A. If this brief is confined to Canada, then what I said about Mr. Maloney is not correct. I thought it was with reference to cases elsewhere.

Q. We are trying to find cases in Canada.

Hon. Mr. GARSON: Would not anyone reading the brief think that it might refer to Canada. This is a pretty important point. The administration of justice here would be seriously libelled if this explanation had not come to the attention of the committee because Mrs. Shipley asked her question.

Mrs. SHIPLEY: It is clear that this group has no knowledge of cases in Canada where innocent people have been executed and subsequently proven not guilty?

The WITNESS: That is correct.

The PRESIDING CHAIRMAN: The witness has no knowledge of that?

The WITNESS: That is right.

The PRESIDING CHAIRMAN: Then, I would suggest that the brief be revised to that extent before it is printed in these records.

Hon. Mr. GARSON: You might say: "while there are a number of instances on record in countries other than "Canada."

Mr. McGRATH: Yes.

Hon. Mrs. FERGUSON: Mr. Chairman, from Dr. MacLeod's experience I would gather that he has had a great deal to do with psychiatric treatment of criminals and I wonder if he can tell us something about what he considers the sociological effect of capital punishment?

Dr. MACLEOD: That is rather a difficult question because it is impossible to devise an experiment which would give conclusive evidence. Much work has been done, but very few conclusive findings have come to light. If I could speak for a few moments about the difficulty, not of treatment, but of diagnosis; unfortunately the legal conception of insanity does not compare with the

medical conception of mental illness. There are many people mentally ill and mentally abnormal whose judgment is impaired at the moment in which they carry out the physical assault who would not show any impairment on a subsequent examination, and certainly would show no evidence which at the moment would satisfy a jury or counsel. However, the advance that is being made in diagnostic medicine and the cases accumulating allow me to say with some certainty that in a relatively short time there will be the possibility of break-off especially in the area of epilepsy and allied epileptic disorders. The sociological impact so to speak of sentencing to death somebody who in a community is considered perfectly normal and has all the advantages of a normal person and has still committed a murder is not quite the same situation that would arise in a person mentally abnormal or mentally sick whom we had a certain responsibility to treat and investigate. Now, the only way I come into this committee, and the subject on which I can speak, is those fields of medicine where we feel there are quite a number of people who have been charged and convicted of murder who are mentally ill, but we realize that they are not legally insane, and we think that by not having some method of removing the mandatory death sentence we are removing society from the responsibility of investigating these cases. I do not say that it does do so, but, putting theory aside, in actual practice diagnostic facilities would not be found in Canada except in highly concentrated medical centres like McGill and Dalhousie. The work of this committee is in some way connected with the work of the commission meeting on mental illness and pleas of insanity. One thing we suggest is that present psychiatric examinations may miss quite a lot of important factors and we would like to see the possibility of the judge being in a position to refer the case not to an individual psychiatrist but to a commission appointed by the Royal College of Physicians and Surgeons who would set up an impartial panel to give the convicted person every consideration possible. So, the sociological impact is very difficult to estimate. The community does not manage to get the full deterrent value from a hanging because it excites many sadistic extincts. I speak from personal experience having spoken to people and especially with murderers and robbers and so on. The deterrent effect on the community is vastly overrated. There is a tendency in the community to feel that it is a good job well done, that the person is guilty and should hang, or else they take a rather morbid interest which is sometimes built up as the trial proceeds.

The PRESIDING CHAIRMAN: Could you give us your personal experience?

Dr. MACLEOD: In the type of work which we do in advanced psychiatric therapy we do hear quite a lot of personal confessions of people. We could not certainly give the names of the patients. But, there is no doubt that during an important murder trial these people are seriously affected by what is going on and what they read in the papers, and I am using that as an example of the effect of the murder trial, and these people I have special knowledge of. I cannot speak of others. In some people there is a considerable morbid interest in the thing.

The PRESIDING CHAIRMAN: Could you give us a specific case of an individual—call it case "A"?

Dr. MACLEOD: I can speak of some sexual patients in England.

The PRESIDING CHAIRMAN: This is from hearsay?

Dr. MACLEOD: No. Cases I actually had under treatment.

Hon. Mr. GARSON: Have you any Canadian cases?

Dr. MACLEOD: I have done nothing but university work since coming to Canada.

The PRESIDING CHAIRMAN: I think that crime is universal.

Dr. MacLeod: Yes.

Mr. Fulton: I would be interested in a case from England.

Dr. MacLeod: I am thinking of one case under treatment who had been referred for treatment by the courts for homosexuality and was up for sentence. There was an important murder trial on at the time, and his whole attitude in reading the papers was to feel very excited and act out some of his own drives by putting himself in the position of the person being hanged, and some of the homosexual practices involving being tied up which he managed to have satisfied by people in the community who fit in with this perversion. I think I pointed out earlier how difficult it is to set up an experiment which would give us this data.

Mr. Fairey: Would the same degree of morbidity be occasioned by a description of the murder itself as by the trial of the murderer?

Dr. MacLeod: I have no evidence.

Mr. Fulton: Does the experience which you have had indicate that the effect of the murder trial and the death sentence—the effect to which you are referring—are confined to people who themselves are already suffering from some sickness or disorder?

Dr. MacLeod: The only ones I would see would be those people.

Mr. Fairey: Would that not be an argument for the suppression of so much publicity in connection with murder trials?

Dr. MacLeod: Yes, we have no doubt about that at all. I think the recent outbreak of slashing women's legs in Montreal is a clear example of that. The publicity of these lurid details does definitely lead to an outbreak of mental abnormality in some individuals. The only cases I have seen are cases under treatment in which they clearly had a predisposition to do this.

The Presiding Chairman: You are telling us of general cases of the reaction of the public to murders. Would you give us some actual experience of your own in this connection?

Dr. MacLeod: I do not quite understand.

The Presiding Chairman: You said a moment ago you were referring to the reaction of the public in the case of a hanging. Could you give us any actual personal observation?

Dr. MacLeod: No, I am quoting perhaps from literature, because there have been no lynchings and so forth as far as I know in England. I have no evidence at all other than the medical evidence which has been accumulated.

Hon. Mrs. Hodges: Would you not admit that the press in England is very much more lurid and sensational and go into a lot of what we would call unwise sensationalism of the actual murder itself. Do you not think that that has probably had the effect on some of these people?

Dr. MacLeod: It could be. I do not want to go one bit beyond my area of competence. I can only speak of isolated cases. I do not want to generalize too widely.

The Presiding Chairman: We would like you to give what you actually have experienced personally.

Dr. MacLeod: The only evidence I would like to give to the committee is experience I have had of patients under treatment.

Mr. Fulton: The one which you have given is of a chap under treatment for psychopathic homosexuality?

Dr. MacLeod: Yes. It was a case I was treating at the time. I was therefore able to study this.

Hon. Mr. Garson: I am somewhat nonplussed as to the point your evidence is making. Is your submission that because homosexuals and psychiatrically

abnormal people react in an excited manner to the crime of murder that, therefore, capital punishment has no deterrent effect upon normal people?

Dr. MacLeod: No. I was trying to make the point in answer to the question what did I know of the sociological aspects and I could only give evidence in these areas.

Hon. Mr. Garson: The experience of the abnormal section of society would not be a very satisfactory criterion for the retention or abolition of capital punishment, would it?

Mr. MacLeod: No, sir. At the risk of being facetious, I would point out that much senior medical opinion is that there is no such a thing as the 100 per cent well person either mentally or physically, and in all of us there is an area that is normal and an area which is quite abnormal and that all of us would be affected.

Hon. Mr. Garson: Do you say that we are all sufficiently abnormal that the reaction of a homosexual and others would be indicative of how the rest of us would act.

Dr. MacLeod: No. The attitude I am thinking of at the moment is that if you accept the fact that the community has treated him as a normal person, that the community is failing by allowing the death penalty to be the only treatment, we feel the community is being relieved of its responsibility to examine more fully what were the factors that led to the mental illness, one manifestation of which was murder of another human being.

Mr. Fulton: Do you say we are prescribing in advance to the jury?

Dr. MacLeod: Yes, and I think it is a very bad prescription as far as a doctor is concerned.

Hon. Mr. Garson: Are you suggesting all murderers suffer from a form of mental illness?

Dr. MacLeod: No. I do not know of anybody who has any evidence that is worthwhile. That is, do normal people commit murder? I do not know. I do know that more mentally abnormal people commit murder, and their mental abnormality is such that it would be accepted by a majority of physicians today while that abnormality could not be given legal status under the present law.

Mr. Winch: Is the key of your presentation to the effect that a person can commit murder and they do commit murder in a state of abnormality, but it comes to a trial and they are investigated by a psychiatrist and the medical profession may not be able to show the abnormality under the law which caused the commission of that homicide.

Dr. MacLeod: Yes. That is very clearly what I am stating.

Hon. Mr. Garson: A perfectly normal person I suppose is capable of anger?

Dr. MacLeod: Yes.

Hon. Mr. Garson: Is anger regarded by psychiatrists as a state of abnormality?

Dr. MacLeod: No. Everybody is born with the ability to exercise anger under certain states of frustration. The majority of individuals seem to develop the ability to control this anger when necessary, in social surroundings. There are a number of people who have a definite impairment of this disability. There is some evidence—actually from a town in England where they investigated murderers who had committed brutal murders compared with individuals who had committed premeditated murder, and there is no doubt that in the brutal murders there was evidence of this impairment of ability to control anger, and it can be related to epileptic illness and extensions of the concept of epileptic illness.

Hon. Mr. GARSON: Do you say that uncontrolled anger is a symptom of abnormality?

Dr. MACLEOD: No. I would have to say this: if a case were presented to me of a person who had apparently showed uncontrolled anger, I would not be able to say whether it was a symptom until the individual had been submitted to a full diagnostic examination.

Hon. Mr. GARSON: It is a question of scientific checking and must be determined on the facts of that case?

Dr. MACLEOD: Yes.

Hon. Mrs. FERGUSSON: On page 3, the second paragraph, it says: "we believe that punishment of the offender can be justified only so far as it (*a*) deters potential offenders or (*b*) reforms the individual offender." I would like to ask Mr. Macdonald if from his experience in penitentiaries he is of the opinion that people who are given life imprisonment or long sentence very often do reform during that period?

Rev. Mr. MACDONALD: Well now, my experience is very brief. It was 16 years ago in Stony Mountain Penitentiary at the time of the Archambault Commission. I think it is agreed that the findings of the Archambault Commission were such to give this nation a mild shock. I do know of one case—and I think that the minister might know of him too—of one individual in that penitentiary who was certainly reformed. He was reformed purely through the power of the Gospel of Jesus Christ. I happen to know him personally. But, that is the only case of spiritual reformation that I have actually seen. Shall I say that the spiritual temper of the prisoners as far as going into it was concerned was such that at that time I felt personally that it was not conducive to their reformation.

By Mr. Fairey:

Q. Mr. Borins, you made several statements with respect to the rigidity and inflexibility of the law and said on page 7 in that long paragraph:

> There were 172 people convicted of murder in Canada in the ten-year period 1942-51, and the court had no choice but to pass the death sentence. The decision on what should happen to the murderer rested with the cabinet. During this same period there were 40 commutations. The prerogative of mercy must be maintained to provide for the exceptional case, but it is difficult to maintain that it is being used only in exceptional circumstances when it was involved in 25 per cent of the cases.

Is that not rather contradicting your argument of inflexibility in the law? —A. The inflexibility I referred to was the law dealing with arrest and the trial—the law of evidence. I certainly had not in my mind what happens after the trial, and I was not even referring to the brief when I was talking about the inflexibility, I was expressing my own views.

Q. One other thing. You expressed an opinion that juries are likely to give a verdict of not guilty because of the inevitability of the death sentence and that is rather contradictory to the evidence this committee has had before. Have you had any evidence or experience to support such a view that juries by and large are more likely to be lenient and hesitate to bring in the verdict of guilty because they know that the judge will impose the death sentence?—A. It would be impossible, sir, for me to say in the case of Regina vs. "A" that the jury in that particular case brought in a verdict of guilty of manslaughter because of capital punishment because it would be impossible for me to say that with a 100 per cent of exactness because you would have to talk to the jurors and sit in the jury room. What I meant was this, that there have been quite a number of cases in which the Crown has adduced

evidence of a clear case of murder and the verdict was guilty of manslaughter, and what I meant was it is an irrestible conclusion that one must draw that the jury hesitates to bring in a verdict of guilty of murder because of capital punishment. It is not only the inference in conclusion that I draw, but in many cases I have talked to jurors which we are permitted to do. As far as the grand jury is concerned there is an oath of secrecy, but in so far as the trial jury is concerned, quite often both Crown and defence counsel talk to the jurors afterwards because it is good experience to see what deliberations go on. I personally have been told by jurors that they felt sorry for the fellow and on the basis of sympathy they did not want to render a verdict. I have been engaged in some cases myself where I felt that that happened.

Q. It is interesting because the evidence—the reply to direct questions—has been that juries do not hesitate when the case is clear to bring in a verdict.—A. I am quite honestly surprised at that evidence.

Q. I was interested in the suggestion of yours that a certain discretion be allowed to the judge or the jury and that the death sentence should not be mandatory. Our feeling has been here, from other evidence, that the responsibility for the particular degree of punishment should not be left to one man, the judge or the small group of persons, but it should be the responsibility of the Canadian people through legislation. You do not agree with that view?—A. To begin with I just want to distinguish between what the Canadian Welfare Council says and what I say. The Canadian Welfare Council recommends as a first step the abolition of the mandatory death sentence and then go on to say that they do not have a recommendation to offer on this problem. It was my own personal view that the machinery that might work would be a change in the law entitling the jury—more than entitling the jury—but requesting the jury to accept the burden of dealing with the sentence. If that is a change in the law—

Q. May I interfere?—A. Yes.

Q. If you give that power to the jury—and tying into the answer to my previous question—where they hesitate to punish, would not that be a weakness of the law right there?—A. That change of law would come about through Parliament so it will be the will of the people. The jury cannot do it unless they are legally empowered to do so.

By Mrs. Shipley:

Q. Is not bringing in the verdict of manslaughter on the part of the jury saying what you are? Is that not why they bring it in because they feel some leniency should be shown?—A. I think it is important that the law is complied with, and that that principle, is a very important principle, and if the evidence is clear that the accused person is guilty of murder then it is not a satisfactory situation to have a verdict brought in guilty of manslaughter. What you are suggesting, Mrs. Shipley, is: well, with the law as it is and with the prerogative of the cabinet, and having regard what the juries do in any event, everything works out just the same. Is that your suggestion?

Q. Exactly.—A. Well, I do not agree it works out the same. But, suppose it does, is it a satisfactory situation to have juries falling down on a job?

By Hon. Mrs. Hodges:

Q. Are you trying to imply that it should be mandatory?—A. No. I am against capital punishment and I am pointing out the abolishment of capital punishment would correct a situation that now exists, and that is that juries bring in verdicts of guilty of manslaughter where the verdict clearly should be one of murder.

By Mr. Valois:

Q. When the jury today, let us say, brings wrongly a verdict of manslaughter, what happens? The judge will of course, I suppose, sentence the man to jail?—A. Yes.

Q. Even to life. If the death penalty were abolished, even if a verdict were found against the accused of guilty of murder at most what would happen then would be a sentence to jail for life.

Rev. Mr. MACDONALD: Might I intercede? There are a great many of us who believe in the Gospel of Redemption and we do hope that in the years to come the penal institutions of Canada will be such that reformation will be possible, and in fact a great improvement has been made over the years, and we are asking that society be protected for such a time until it is possible to attempt reformation and possibly redemption.

Mr. SHAW: If you have abandoned the procedure of soliciting questions in order we should know it.

The PRESIDING CHAIRMAN: We have not abandoned it. But perhaps we have deviated from it. We have not abandoned the principle of allowing each member to ask questions. I will confess that I have been rather lax in administering the procedure as has been set down by the committee because I felt that the questions that were being asked by other members have been quite pertinent to the question before the panel and if I have deviated too much I apologize.

Mr. Fairey, have you finished?

Mr. FAIREY: I think that will do.

The PRESIDING CHAIRMAN: Mr. Winch.

Mr. WINCH: My questions have been answered.

The PRESIDING CHAIRMAN: Mr. Fulton.

By Mr. Fulton:

Q. This brief makes no recommendation on the question as to where the discretion should lie if your recommendation were carried out, that is the mandatory death sentence being removed. I would like to ask the panel if they would like to express their personal opinion as to whether they think the discretion should lie with the judge or the jury?

Mr. BORINS: I have answered that by saying with the jury.

Q. That is your opinion?—A. Yes, sir.

Q. Have any other members of the panel any views on that?

Dr. MACLEOD: Dispensation of clemency is in many ways different from a thorough investigation of the case. If I could quote from personal experience, from the reading of case reports about a patient you can never get the same understanding of a human being as when you see him on the spot, and I feel that the jury itself is, of course, representative of the community and I cannot imagine any finer panel of the community who would be in a better position to give weight to all the factors than the jury. I feel that it is asking too much to put all this on one man, I think that the jury should accept this responsibility.

Mr. FULTON: You think that a jury who have been asked to exercise this very onerous duty of deciding whether or not the man is guilty of the offence, of taking the life of another man, should then be asked to go back and decide whether this man should himself suffer the death penalty?

Dr. MACLEOD: I think that they should be asked to consider whether there was anything which would mitigate the crime down to manslaughter. They should ask themselves whether if there were any extenuating circumstances.

I would not put it that they should decide whether he hangs, but should go very carefully over all the evidence and their impression of the person himself and the possibility of reform.

Mr. FULTON: Would it not come down to that in the long run? What you are asking is that the jury should decide whether he hangs or not, rather than that the law should decide it?

Dr. MACLEOD: You are asking the jury as a group of human beings, taking everything into consideration, do you think that this individual was faced with a situation which in some way impaired his ability to live up to what we expect of a person, and was it entirely due to his fault, or in some way mitigated by his upbringing or his experience in life.

Mr. FULTON: Perhaps it would be a matter of argument as to whether that would be a proper duty to impose on a jury, but you feel that would be the preferable way to have it?

Dr. MACLEOD: Yes.

Mr. BORINS: You just asked the question whether Dr. MacLeod feels that the jury or the law should decide it. Now, if the jury were enabled to make the decision they would be doing something because of a change in the law.

Mr. FULTON: The law would be enabling the jury to do it. In one case the law decides, or the jury is asked to decide, whether the man did or did not commit the crime and if he did he is automatically subject to the death penalty. What you are asking is that the jury should make the decision on that. You told us I think that the recommendations of the British Royal Commission—would it be fair to say—should be pretty closely followed by this committee?

The WITNESS: That these matters be considered where they apply and fit into our law.

By Mr. Fulton:

Q. I am going to ask some questions on this. Turning to paragraph 609, on page 213, would you agree with me in my statement that we do not have the doctrine of constructive malice in Canada?—A. We have it but it is described in a different way. That is where death results in the commission of an offence. Now, here the doctrine of constructive malice should be abolished. In my opinion I am not prepared to agree in every case where death results in the commission of another offence that it is murder because there can be such a thing as an accident. But, we do have constructive malice in different language. We do not find that language in the Criminal Code. I do agree with you to some extent.

Q. Then, leaving out (*b*) and coming to (*c*), would you agree with me that the recommendation contained in subparagraph (*c*) is already the law of Canada?—A. Well, except for the words "deprived of his self control". We deal with provocation in the Criminal Code. That is what I meant when I was referring to an enlargement of the M'Naghten Rules, and that I think is what Dr. MacLeod meant when he was talking about people whose ability to control anger is impaired, that the law in that respect should be enlarged to include people of that kind.

Q. Are we not confusing sub-paragraph (*c*) and (*d*)? Frankly I do not quite understand the effect of your amendments. You are asking that the M'Naghten Rules be enlarged but surely only to the effect that they recommend forms of insanity which the law does now recognize?—A. Yes.

Q. But, they do not necessarily refer to provocation which applies to consideration of whether or not a man was insane. If it is established that he was provoked as a reasonable man there is very little question as to

whether or not he is insane.—A. I do not think that the court puts that interpretation upon it. The M'Naghten Rules in my opinion deal with a prolonged disease of the mind, and again that is the first complaint about it, because most of the psychiatrists give serious consideration to temporary black-out of the mind which has no place in our law, at the present time. I think that would be a question of fact for the jury would it not?

Q. That would require an amendment to the law.—A. It would, because the decisions in Canada at the present time pay no attention to a defence of that kind. Mind you, even although they cannot pay attention to a defence of that kind, nevertheless, quite often defence counsel will adduce evidence with a psychiatrist to establish that at the moment of the commission of offence there was loss of reasoning, and while that is not a defence some juries have acquitted people on that evidence.

Q. We are dealing with the defence of provocation here, not with the matter of an enlargement of the defence of insanity, and I wanted to deal with the question of insanity and although the cases and the Code establish it as a matter for the jury to determine whether or not the provocation existed, the jury are entitled to take into consideration just what they want to take into consideration?—A. Yes.

Q. So I am asking you really this: so far as the phrasing of the law or the jurisprudence surrounding the offence of provocation is concerned is it not a fact, that sub-paragraph (*d*) is the law in Canada?—A. It is pretty close to it, except that (*c*) as it is worded here emphasizes the words "deprived of his self control" and I think a wider interpretation of that is intended than the interpretation placed upon the matter by our courts. Our courts I do not think put as wide an interpretation as is intended here on the matter. I may be wrong.

Q. Would it perhaps be fair to say that you are not saying there is a change of substance necessary? It is not necessary in your view to introduce a new principle, but perhaps merely to clarify the present principle?—A. Exactly. In so far as provocation is concerned, yes.

Mr. FULTON: I have nothing further to say about (*d*) and (*c*).

Dr. MACLEOD: Could I add something about that. The modern attitude in medicine is that under stress it would be possible to break down any reasonable man if he were subjected to stress. There is the question of provocation of a reasonable man. and what might be provocation in a set of circumstances in an outburst of rage.

The PRESIDING CHAIRMAN: Now, Dr. MacLeod, I think you were going to give us some further evidence.

Dr. MACLEOD: I am speaking of this question of evidence which as far as I can see really implies that we have requested a man who has been faced with a social situation which has been so provoking that he is unable to control himself resulting in his general impairment. Modern medicine suggests that there can be many cases of mental illness or abnormality which would create no difficulty at all to the psychiatrist. They lie in the ability of a person to control himself; but these cases are not considered at all under the present law, such as uncontrollable impulse and the so-called reasonable person. I was wondering—I do not personally agree with the words "self-control" or "prevention". I think we have to decide whether there could be medical evidence uncovered that would be satisfactory to a body of disinterested scientific people.

Mr. FULTON: What you are recommending in effect is that our law should recommend that what in law is called an irresistible impluse—

Dr. MACLEOD: Yes sir.

Mr. FULTON: That would seem to relate to the defence of insanity.

Dr. MACLEOD: I was really pointing out that the principle might be modified, if we consider it against the background of modern medicine.

By Mr. Fulton:

Q. Mr. Borins in answering a question asked by Mrs. Shipley, I think, as to the difficulties in the safeguards that we have set up around the accused person, said that in his opinion based on his experience there were cases where the accused had not been adequately defended and then went on to say that the court of appeal passes its judgment entirely on the record. Therefore, once the trial was concluded, there was really no way in which, under the code, as a matter of law, you could ask that the case be reconsidered.

Mr. BORINS: That is right.

Q. Whatever is used, it is a matter of executive clemency from there on?—A. That is right.

Q. Would you agree that that is going perhaps a little too far and that there are probably further safeguards or defences in the law itself in that the court of appeal can direct a new trial if it is satisfied that there has been a substantial miscarriage of justice, and that it is quite open to counsel to go before the court of appeal and argue that a man's defence was not properly presented to the jury, and not only that there was misdirection or non-direction by the judge, but that in fact the man's defence was not disclosed to the jury? —A. I do not think the court of appeal would pay attention to that ground, nor are they entitled to accept that as a ground. I know because I tried it and I did not succeed. That is not an answer, of course, but I saw this happen in a case where a young lad of 19 years of age was accused of raping a woman of about 40 years of age and I felt there was insufficient evidence. However, the police had obtained a statement admitting intercourse and sexual relations, and this female complainant testified. Why the defence counsel in that case did not put the accused in the box I will never understand; and the only conclusion I could come to was that it was through lack of experience. Moreover, the young man had no record about which he had to worry about being disclosed. He was in prison and I thought there was a very grave miscarriage of justice there resulting in a sentence of 2 years. I think that is a very strong illustration. We went to the court of appeal and I argued as well as I could that there had been a serious mistake made here. As a matter of fact, I had an affidavit from the appellant that it was his desire to give evidence and explain everything that had happened. But he relied on the advice of counsel not to go into the witness box. I think that counsel in that case felt he could never be convicted, and in regard to his interpretation of the law he felt quite safe in advising his client not to go into the witness box.

Now the court of appeal does not have to pay attention to affidavits nor could they give effect to my submission along those lines, with the result that the conviction was confirmed. That is the answer to your question. I do not think it is a ground upon which the court of appeal can act or recommend.

Q. I wonder if you are prepared to express an opinion or make a recommendation as to whether you feel that the grounds of appeal might be enlarged in capital cases? Have you given sufficient thought to that subject? It is a matter which might be very interesting to this committee.—A. I think the provisions of our Criminal Code are already wide enough as it is and in spite of what I said as to one of the grounds in answer to a question from Mrs. Shipley, I think it would be dangerous to make that a ground upon which the court of appeal could rely, namely, that counsel was inexperienced, because that might be used too often. It might be abused and that would be dangerous, in my opinion. But the present section of the Criminal Code goes far enough. Just last week in Toronto the court of appeal quashed a conviction for murder and substituted a verdict of

guilty of manslaughter, and sentenced two young men to 8 years. I think that was an administration of justice in action. Now, if our Criminal Code in respect to the court of appeal should go that far, I think it has gone far enough.

Q. Well then, I wonder how I should put it: Your point here then is perhaps that before the sentence of death is passed—no, that is not what I really want to say. You are not going so far then as to say that our law does not erect sufficient safeguards around the accused person?——A. There are sufficient safeguards there if they are properly enforced. Mr. Maloney referred to a number of safeguards and then proceeded to criticize some of them. And then he was answered by Mr. Common. I think one of the complaints which Mr. Maloney made was that crown counsel does not always disclose all the evidence at the preliminary hearing. Well, to make the preliminary hearing an effective safeguard, the defence counsel has the right to ask the Crown at the preliminary hearing who the witnesses are and he has the right to call them. In Mr. Maloney's illustration, no one appeared for the accused, Jackson, in that case. However, he states that he was denied the summary of what the 40 witnesses named on the indictment would have to say, and he said he was denied that. I do not know what happened there myself and all I can say is this: That if Mr. Maloney is correct in that assertion—and I know Mr. Maloney well enough to admit that if he says this was a fact, then it was a fact; and if this was so, I think it was certainly wrong to withhold a summary of the evidence or some information particularly in a case where the accused person appeared at the trial or hearing without counsel. Of course at that particular time in Toronto there was a lot of hysteria because of the brutal slaying of Sergeant Tong with whom I worked in many many cases and because of a number of escapes that took place around that time; but as to safeguards, if they are properly enforced and respected—there are sufficient safeguards. And I think Mr. Maloney referred to the judiciary and to the varied temperament of one judge and another judge.

I have nothing to say in that regard except that I think we ought to pride ourselves on the judiciary in this country, and except for one thought that I have in mind: but I do not know how it can be applied to our system, and that is when we are dealing with criminal law it is a highly specialized branch of the law requiring a vast amount of technical knowledge and knowledge as to how criminals act and talk. When you talk to a man who is an accused his words are, I submit, to be interpreted not as words would be interpreted if used by a private person. I always felt it would be a splendid thing if it could be applied to our system and if we could have some form of specialized court in so far as criminal work is concerned; that is, if the person appointed to the bench is a person who has had many years in prosecution and defence work in criminal cases; it would be a splendid thing if we could avail ourselves of his special knowledge and experience, and if such a judge could be confined almost exclusively to trying criminal cases. Now I am not making that suggestion with the slightest idea of criticizing the judiciary in any way. I have the greatest respect for them.

Q May I ask you this: Here I must confess ignorance, but is there not some approach to what you have just been describing in the English system of administration of criminal justice? Don't they have a court on the criminal side? —A. They have a criminal court of appeal.

Q. Well, on the appeal side, but do they not have any court of first instance, do you know?—A. I do not know, I am not aware of it.

Q. I have a number of other questions which I would like to ask arising out of some of the statements made in the brief, but I think I will let them stand until later.

The Presiding Chairman: Now, Mr. Boisvert.

By Mr. Boisvert:

Q. I had many questions to ask with respect to the brief but I will limit myself to one question now. Your council favours the eventual abolition of the death penalty and the abolition of the death penalty in every case of murder. Isn't that in the conclusions of your brief? It comes to this conclusion: You are contending that we should re-examine the basic philosophy and the concepts that apply to our understanding of a criminal and on page 2 of your brief you state:

> The responsibility for crime does not rest with the individual criminal alone.

And in the second paragraph on page 2 you say:

> In many ways the criminal is the product of his environment.

Don't you think that you switch the moral responsibility from the individual to society by those two allegations?—A. It is not a complete switch.

Q. Not a complete switch, but is it not a switch?—A. No. Perhaps it is difficult to interpret. I agree that it is a switch. I think it is merely a submission that there is a responsibility on the part of society and we strongly urge that, particularly with young offenders, with teenagers, many of them are products of their environment. When we talk about environment we talk about the home and parental control and parental supervision. That is all part of modern day society. The views that are expressed there are the views of social scientists. I noticed that expression, "social scientist" and I thought you were referring to phychiatrists and phychologists.

Mr. WINCH: Perhaps Dr. MacLeod might comment on that.

Dr. MACLEOD: I will try. First of all I would like to differentiate between phychiatrists and psychologists.

By Mr. Boisvert:

Q. I would know the answer to this question: Is it not true that during the past there was a time when society was not organized as it is today? —A. I suppose so.

Q. And is it not a fact that the crime of murder has always existed throughout the ages?—A. Yes, that is a fact.

Q. And was there not a general principle accepted by every individual throughout the ages that the crime of murder should be punished?—A. I do not understand the question.

Q. Is it not a fact that throughout the ages there was a principle that the crime of murder had to be punished by death?—A. There was a policy that capital punishment should be abolished and it has been abolished in a great many places.

Q. I agree with you, but that is in modern times. I know that in France, for instance, during the revolution they abolished the death penalty but it was restored later on by a new government. In some countries they have abolished it, but is it not possible that if we proceed to abolish the death penalty we are going to develop among society the desire to punish the crime of murder by free justice rendered by the people surrounding the individual, be it man or woman, who was killed by the murderer?—A. The records of those countries that have abolished capital punishment I do not think support you in that.

Q. Then I shall read you the opinion of a great jurist from Belgium and he says this: It is found in the report of the Royal Commission on Capital Punishment, "No. 3, Europe," published with the report of the Royal Commission.

The PRESIDING CHAIRMAN: Might I interrupt to say that the witness has merely expressed his opinion and that is what we have him here for.

Mr. BOISVERT: I would like to ask him to comment on another opinion that I am going to read:

Mr. FULTON: Does he agree with it?

By Mr. Boisvert:

Q. Would you agree with what is said by that great jurist of Belgium?

> In certain cases of murder committed in troubled times or in particularly odious circumstances, the death sentence is the only punishment capable of preventing either manifestations of private vengeance or outbreaks of public wrath.

Would you have any comment to make?—A. I should like to know if he means that the death penalty is justifiable?

Q. In Belgium, as you know, the death penalty is the sentence, but it is never executed. That is his contention, and he is avery great jurist. He said that if we abolish the death penalty, we are going to develop among our society the desire of people to render their own justice in handling the murderer which would be very bad for society. And in the United States today we see many of those executions.—A. May I answer that by reading also from the report of the Royal Commission on Capital Punishment, that is, the 1949-53 report at page 98, and I am reading the conclusions on matters dealing with the defence of insanity, and here is what the commission has to say:

> Recently, however, the suggestion has sometimes been made that the insane murderer should be punished equally with the sane, or that, although he ought not to be executed as a punishment, he should be painlessly exterminated as a measure of social hygiene. The argument is in each case the same—that his continued existence will be of no benefit to himself, and that he will be not only a useless burden, but also a potential danger to the community, since there is always a risk that he may escape and commit another crime. Such doctrines have been preached and practised in National-Socialist Germany, but they are repugnant to the moral traditions of Western civilization and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assum the continuance of the ancient and humane principle that has long formed part of our common law.

That is our answer.

Q. When you speak of humanity you must bear in mind also the fact that there are those who intend to commit murder.—A. Well, of course, the committee report of the Canadian Welfare Council suggested the technique of a mandatory feature of leaving it to the jury, and if that were the law, then there would still be the possibility that the person who, on the evidence, has calmly planned a murder, and there would be evidence established of premeditation; and if it was a brutal killing the law would still allow for a final verdict of hanging. The council is not going all the way, I might say, in fairness to the council.

Q. From your last answer you would ask us to change the Criminal Code in having degrees of murder?—A. No, not degrees, just removing the mandatory element.

Mr. SHAW: Mr. Chairman, I should like to move that the delegation be asked to appear again at another sitting, I have a number of questions I want to ask. It is now 1:00 o'clock and I realize that someone may suggest that we sit for just a little longer time. Some of us have other commitments and I have a number of questions to ask Dr. MacLeod. I am particularly interested in his evidence and I should like to ask some questions of Mr. Borins but I do not think that I should ask them now so I suggest that they appear at another sitting.

Hon. Mrs. HODGES: Could we make it this afternoon?

The PRESIDING CHAIRMAN: As a matter of fact, because the committee has been discussing the question of lotteries, I took a gamble.

Mr. BOISVERT: Are you sure of winning?

The PRESIDING CHAIRMAN: No. I did not win. I thought we would be through at 1:00 o'clock and I instructed the clerk to say that we would give up this room for this afternoon for 3.30 o'clock. But if you feel we will not finish, perhaps we can ascertain whether the room will be available this afternoon at another hour.

Mr. SHAW: Would the delegation representing the Canadian Welfare Council find it possible to return at a later date?

Mr. FULTON: I think it would be better if they did.

The PRESIDING CHAIRMAN: We have tomorrow taken up.

Mr. SHAW: Whether it be tomorrow or next week does not matter.

The PRESIDING CHAIRMAN: We have an exacting schedule to follow.

Hon. Mrs. HODGES: Could we not meet immediately after lunch?

Mr. WINCH: I think we should carry on while all this is fresh in our minds.

The PRESIDING CHAIRMAN: Would it be convenient to your delegation to meet at 1.30?

Hon. Mrs. HODGES: Make it 2.00 o'clock.

The PRESIDING CHAIRMAN: We cannot tell you until we find out whether we can have this room at 2.00 o'clock. For a moment I cannot tell you. That is why I suggest we carry on for a few moments until the clerk gets back to tell us whether we can have the room this afternoon. I think your suggestion is advisable that we carry on sometime today. Is it agreeable that we carry on for a few moments, Mr. Shaw?

Mr. SHAW: Yes.

The PRESIDING CHAIRMAN: Are you through, Mr. Boisvert? Now, Mr. Brown?

By Mr. Brown (Brantford):

Q. I raise a question that came to my mind and I ask whether the submissions which have been made do not tend to set up degrees of murder. It seems to me that they certainly do and I would like to have your comment. —A. There is a great distinction in murder.

Q. You mean murder which does not entail the death penalty and murder which does?—A. No. I think the submission tries to avoid the setting up of degrees because we were asking that the law in some respects be enlarged; for instance, the law dealing with insanity, or the law dealing with the question of irresistible impulse and the like.

The PRESIDING CHAIRMAN: It is now after 1.00 o'clock. Could we not meet at 2.00 o'clock until 2.30 and if necessary from 3.00 o'clock until 3.30? We cannot have the room after 3.30. Is that agreeable?

Mr. FULTON: Is it possible for the witnesses?

The PRESIDING CHAIRMAN: Is that agreeable to the witnesses?
Agreed.

Hon. Mrs. HODGES: We cannot be here later than 3.30; we cannot keep this room because it is taken for another committee.

The PRESIDING CHAIRMAN: We will recess until 2.00 o'clock.

AFTERNOON SESSION

2.00 p.m.

The PRESIDING CHAIRMAN (*Mr. Brown, Essex West*): When we adjourned you were interrogating Mr. Borins, Mr. Brown.

Mr. Norman Borins, Q.C., called:

By Mr. Brown (Brantford):

Q. Yes, I was asking Mr. Borins whether the council's recommendations did not tend to set up rather vague degrees of murder which were left wholly to a jury?—A. I do not think so, Mr. Brown, because the law is not changed in that respect at all. The recommendation deals merely with sentence. I do not see how it affects the degrees—that is, in law. It may be that the results may appear that we are recommending that, but nevertheless we are not.

Q. What concerns me is this: would it not result in a person being sentenced to death for murder perhaps in one locality under certain circumstances whereas in another locality or before another jury he would not have been sentenced to death? In other words, you are instituting a system which I have sometimes heard referred to as "justice by ear." The matter is left wholly in the discretion of the jury, and a man might be convicted and sentenced to death in one part of Canada whereas in another part of Canada he would not receive the death sentence. My submission is: would that not lead to confusion in the administration of the law?—A. Is that not our whole system of administration of law—both in civil and criminal cases—Mr. Brown?

Q. To some degree, but would this not widen it very considerably?—A. One judge may, when trying a case with a jury, be completely satisfied that a man is guilty of the rape charge he is facing and yet another judge would laugh at the decision and say, "You don't know women like a know women! You are all wrong. That man is not guilty of rape at all."

Q. True, but would this not tend to lead to a much wider divergency of penalty in communities and different sections of the country?—A. I do not think so, Mr. Brown. I definitely am of the opinion that it does not establish the degrees of murder and that while one jury might with the same set of circumstances bring in a recommendation of mercy another jury might not. They are no different from judges or any human being trying a case and having to decide on a set of facts, having to decide whether one particular witness should be believed or whether one particular witness is telling the truth or not and how much weight should be attached to the evidence of the particular witness. Those are things which cannot be avoided. That is our system. There is no other way of trying cases—it does not matter whether it is the judge or the jury.

Q. I was not referring so much to our present system, but would that not increase that divergency which does exist?—A. Do you not find divergency in sentences today?

Q. Yes, to a degree. There could not help be some divergency, but I was wondering what your views would be. Would this not tend to increase the divergency across Canada between sentences?—A. I have a lot of faith in juries. The recommendation that I was making is this: that nothing is said to the jury during the course of a trial that might influence them in their verdict. Not a word is said about any recommendation for mercy. None of the circumstances concerning the background of the individual are mentioned, so that the jury is not in any way influenced. But after the verdict,

the jury is then called back for another issue and they are entitled to hear a wide range of evidence. The rules of evidence are relaxed. Pople are brought in to speak of the family and the reputation of the accused, and about all other circumstances that might be revelant to the question of punishment. I think you can rest assured that if in any particular case the facts establish there was a great deal of premeditation and a very brutal killing and there is no existence of provocation or any sort of abnormality that the jury is likely to mete out a sentence of capital punishment by withholding a recommendation of mercy in any event.

Q. And do you not think that if those statements were implemented that a man's life would depend more on the vagaries of public opinion in different localities than ever before?—A. No, I do not think so, because I have had experience in trials throughout various parts of the province of Ontario and I find that one group of people is no different from another group of people. That is, one jury is no different from another. It all depends on how you submit your case to the jury.

Q. I have no further questions.

The PRESIDING CHAIRMAN: Mr. Shaw?

By Mr. Shaw:

Q. My first two questions are based on the brief. Turning to page one of the brief and going back to the use of the word "eventual", Mr. Borins, would you be prepared to state categorically on behalf of the Canadian Welfare Council that they are opposed to capital punishment? The use of that word disturbs me—bothers me.—A. I will attempt an answer to that, but I would like the other people here with me to feel free to correct me or to add or take away from anything I say. I have the feeling when the matter was brought before the Canadian Welfare Council board that in principle there was agreement that on the ground of public expediency it was felt that we should not rush at this and I think it was desired that we compromise and deal with it step by step but that is why the words "eventual abolition" are there—to indicate that in principle they would like to see capital punishment done away with.

Q. We as members of this committee, Mr. Borins, will sit for a certain period of time and then make a recommendation. Would I, as a member of this committee, be fair in informing myself that as a matter of policy the Canadian Welfare Council is opposed to capital punishment? In weighing their evidence I would have to be able to answer that myself.—A. I would think so, yes.

Q. There is a sentence on page 11 which disturbs me a bit—referring to a jury: "If a unanimous vote is required, it would mean that one member of the jury could send the convicted murderer to his death against the opinion of the other 11 members of the jury." What do you mean by that?—A. I suppose what is meant by that is this: if a unanimous verdict is required on the question of punishment, as on the question of guilt or innocence, then one person on a jury may withhold the recommendation of mercy, and in that way this one person may, if a unanimous decision is required, prevent a recommendation from being brought into the court and the result would have to be a mandatory bringing about of a death penalty.

Q. Then I would be correct in assuming, would I, that this refers only to the recommendation of mercy and not to the guilt or otherwise?—A. No, definitely not.

Q. I should like to direct one or two questions to Dr. MacLeod. Doctor, did I hear you correctly when you stated you had been in Canada two years?

Dr. MACLEOD: I have been in Canada for two years, but I have been back about three—but I have been out of Canada.

Mr. SHAW: Have you had cause, doctor, to pay any particular attention to the use of psychiatrists in capital cases both by the Crown and Defence?

Dr. MACLEOD: No, not in Canada.

Mr. SHAW: I asked you that because I am a layman and sometimes confused and bothered to note that when the defence calls a psychiatrist the Crown calls one too. They have two expert witnesses directly opposite in their testimony. Now, have you any recommendation with respect to any type of board that should be set up to which each and every one of these cases might be referred, let us say? It seems to suggest that it should be maybe at pre-trial, or maybe during the trial, or maybe following conviction, but in any event prior to execution.

Dr. MACLEOD: Yes, sir, we have made that recommendation in public. We hope that the time will come when it will be neither the prosecution nor the defence that will call expert witnesses, but it will be the judge. We advocated the setting up of a board, perhaps of representatives from the Royal College of Physicians and Surgeons, and if necessary the medical people concerned at the universities, say, professors of medicine or psychiatry. It would be an impartial board. The judge would have the right to refer the case to it, we would suggest at the time of pre-trial. It would not be asked to give an opinion as to guilt, but merely an opinion as to the person's mental state and whether there was any evidence as to whether his ability to control his impulses was impaired as a result of mental abnormality or illness. They would not have to fulfil the requirements of the present M'Naghten Rules which, quite frankly, we do not think can be fulfilled in straight medicine. In other words, there is no such thing, in my opinion, as the example described in the M'Naghten Rules. You cannot have insanity in one part of the personality and not in another. A human being works as a whole person, and the board would merely give the judge the benefit of a modern medical examination carried out at a centre competent to do so. The group that I am with are very much against the idea of the prosecution and defence calling expert witnesses and each one reviewing the others case. We do not think that the condemned person is being given a fair trial. What I mean by "trial" is in the medical sense.

Mr. SHAW: I have other questions, but I must be away at 3.30.

The PRESIDING CHAIRMAN: We will be back at 3 o'clock, if you so desire.

By Hon. Mrs. Hodges:

Q. I would like to ask a question, Mr. Borins, I was interested in your recommendation that the question of the sentence should be left to the jury. You had implied that the accused would get a fairer chance of escape from capital punishment if it were left to a jury than if it was left to the present stages of reference to the court of appeal and final submission to the cabinet. I am asking for your frank opinion. Do you frankly think that a jury of ordinary people with no experience of crime or psychiatry or anything like that, in a highly emotionally charged atmosphere, could give as reasoned and logical a sentence as someone who is, according to your own suggestion, fully cognizant of the criminal law and all that goes with it and has experience? —A. If the death penalty is mandatory and that system should remain, I am not suggesting that our present system is an unfair one.

Q. I am not discussing that. I am saying that you think that the jury should have the sentencing decision. Do you think that they would be more competent, as compared with our present system?—A. I would think that an accused person is safer in the hands of 12 laymen.

Q. In spite of the fact that there may be abnormal people among them, people of abnormal conduct who themselves are not fully competent, mentally competent or otherwise?

Rev. Mr. MacDONALD: It could also apply to judges.

By Hon. Mrs. Hodges:

Q. But I am just asking a question.

Mr. BORINS: They will not be guessing on these things. There will be a wide opinion on the question of punishment. There will be doctors called in by the Crown, doctors called by the defence and many other witnesses on the question of punishment, and the jury will make its decision on that basis.

Q. As I say, it is a highly emotionally charged atmosphere. Speaking from this point of view, I just wanted to hear your view.—A. Well, it is considered by lawyers that in deciding on questions of fact the jury system is a good system. If there is a case involving special questions of law and very little question of fact, one may make an application outside of criminal cases for a trial without a jury and strike out a jury notice. But I can think of no cases where fact alone is being considered when it comes to the question of sentence. That being so, I think that the jury is the competent group to deal with it.

Hon. Mrs. HODGES: Thank you.

By Mr. Blair:

Q. Mr. Borins, at one stage in your testimony this morning you mentioned that the record showed that capital punishment achieves nothing that could not be achieved by other forms of punishment. I wondered what records you have in mind?—A. I had in mind, Mr. Blair, the records of those countries and states where capital punishment has been abolished. I have not the records here, but I know that they exist because I have read them, and there are records in the Royal Commission on Capital Punishment referred to it here. If you wish, I could undertake to send along at a later date any records that I have in my files at home.

Q. If that would not be too much trouble, I think that it would be helpful to have statistics of this nature. Would you care to comment on one of the statements of the report of the United Kingdom royal commission found in paragraph 64 at page 23? They say:

> We agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide rates of these states, and that, "whether the death penalty is used or not and whether executions are frequent or not, both death-penalty states and abolition states show rates which suggest that these rates are conditioned by other factors than the death penalty".

A. In other words, does that statement mean that where you have the death penalty if the situation is not any better than where you do not have it, you might as well do away with it.

Q. The statement speaks for itself. I was wondering whether you have any comment to make about that?—A. That is my comment. Since those who wish to retain capital punishment cannot come along with an argument and say, "Look at these countries and states where capital punishment has been abolished, and there has been an increase of crime and murder." Since those people are unable to do that, then my submission is, why have capital punishment?

The PRESIDING CHAIRMAN: Ladies and gentlemen, could we reconvene here at 3.00 o'clock? We will not be able to have this room after 3.30.

Agreed.

By Mr. Blair:

Q. I have one or two more questions. I would like to ask Mr. Borins about his support of the British royal commission's recommendation that the doctrine of constructive malice should be abolished. I understood Mr. Borins to say that this would not involve a major rewriting of the Criminal Code.—A. That is correct.

Q. Mr. Borins, in paragraph 111 of the British royal commission's report at page 41, the commission points out that the choice lies between retaining the doctrine of constructive malice or abolishing it altogether, and it stresses that the adoption of a proposal such as section 175 of the draft British Code of 1878 would not be satisfactory. Now, Mr. Borins, I think you know that our present definition of murder follows that section 175 and I wonder if you had considered this when you mentioned that we would not have to rewrite the definition of murder?—A. Yes.

Q. Well then, on this question of constructive malice, what you are really proposing then is that section 260 as it stands at the moment should be practically rewritten in order to provide a new definition for it?—A. Yes.

Mr. BLAIR: Mr. Chairman, I believe there is considerable interest in having some further comments from the panel on the question of environment as a factor in criminality and I raise that now for your consideration .

The PRESIDING CHAIRMAN: Well, are there any further questions to be submitted by the committee?

Mr. WINCH: That actually was my question and I endeavoured to raise it at a time when the matter of environment was being discussed as to whether or not it should have a bearing in a decision of a judge or jury on the question of guilt in a homicidal case. So if I can put it as a direct question I think I am most certainly speaking on behalf of the majority of this committee: could we ask Dr. MacLeod for his own personal experience and also for his knowledge on behalf of himself and his profession as to what he and his profession consider the position which environment plays in criminality, and if he can give any particular reference with respect to homicidal cases, and as to what consideration should be given to environment in a judgment in a homicidal case.

Dr. MACLEOD: This is a very important question as far as we are concerned as doctors, and therefore I ask for your leniency to preface my remarks with a previous answer in relation to a previous question which I gave. First of all, I point out that the information we have is very inconclusive. For example, if we are asked: Is capital punishment a deterrent, quite frankly there is no conclusive evidence as to whether it is or is not. We have to take samples from investigations which have been carried on, and part of the recommendations of the report. The samples I am giving are of people who are really not in need of treatment and in another case they are people to whom capital punishment is not a deterrent.

The PRESIDING CHAIRMAN: Can you give us a particular instance?

Dr. MACLEOD: You mean from people I have had under treatment?

The PRESIDING CHAIRMAN: Can you tell us of a specific case?

Dr. MACLEOD: I mentioned one today in which the individual had sadistic propensities. He developed fantasies of how he himself would have liked to have carried out a similar crime. He imagined a similar situation of killing somebody and then escaping and having the police chase him, and the way he would have carried out that kind of crime. So we could only give medical opinion that those are types of fantasy people who do commit crimes have but I want to go into the question of environment. There is a conclusive body of evidence that if you remove a human being out of the social scene for a

little period of time you can produce considerable deterioration in his personality. I can quote extracts from Professor Hebb at McGill who says that if you take an ordinary human being out of his environment and put ping pong balls which are cut in half over his eyes and put gloves on his hands and put him in a quiet room, you can produce symptoms which are found in severe cases of mental illness. We also have evidence that if you take a child away from its mother, especially during the first two years of life, there is serious impairment which takes place in the child's ability to develop and mature physically, intellectually, and socially and there is some evidence as well that in a case of incarceration of a criminal for a long time in institutions which had no rehabilitation program, or if you force retirement on people from work before they are ready for retirement which would take them out of the stream of social influences, you can produce a rapid breakdown which cannot be restored very easily.

Then your maturation of a child from infancy to the adult group involves acquiring skills, not only physical but social skills, and there is evidence to show that the ability to control one's temper has a tremendous bearing on the social development of youth, and if they have not had the benefit of a healthy home environment, one is inclined to believe that there may be organic evidence of those defects, and one can sometimes see members of a group in a group in a situation where the mother cannot control the children and some of the cases are the result of social environment. There are other factors and circumstances such as hereditary factors as well and all of them have not been investigated yet.

Social environment does play a considerable part in impairing a person's ability to conform to social standards, morally and legally.

Mr. FULTON: As to the term "social environment" in the context in which you are using it—does it relate to society as a whole, or to the home environment?

Dr. MACLEOD: It relates fundamentally to the home or the home environment and definitely there seems to be the need for a child to have a healthy family environment so that from there on, to school and into the community; by social environment it definitely means the family.

Mr. WINCH: Do you also include community environment?

Dr. MACLEOD: "Community" means very little. It has to be spoken of in concrete terms; and as you say, a human being must have other persons to make up the home environment of that person.

Mr. WINCH: And our economy?

Dr. MACLEOD: In so far as all those factors are concerned, there may be emotional worry about where the money was coming from, and what the housing was like in so far as it could be ascertained. Slum areas have an emotional relationship with murder; they are factors which influence human beings on the emotional side and they set up a chain reaction in influencing a growing child. Now, the history of this discovery has had a bearing upon physical medicine.

Mr. FAIREY: You mentioned slums as an environment. You were trying to narrow the concept of environment, and I take it that you will admit that there can be a happy environment even in slum districts?

Dr. MACLEOD: There is no clear-cut evidence that economic factors alone if taken out of their context play an important part; but there is a considerable group of individuals who surround their children during their development, and if it is not possible to do so in a slum area, then that interferes with the development of the child.

Mr. FAIREY: But it is possible?

Dr. MacLeod: Perhaps I should put it this way: It is less possible in a slum environment taking that factor into consideration than it is in a healthy environment. But speaking as a doctor, one cannot help but comment on the fact that we think a very materially satisfying environment cannot but be helpful to emotional and spiritual development; it is the warmth of the environment which is important, but this type of deprivation can occur in the very best families. There is no evidence at all that good economic conditions of themselves imply a healthy emotional upbringing of the child.

Hon. Mrs. Hodges: That is borne out by statistics and the number of delinquent cases that come from apparently good homes?

Dr. MacLeod: I would refer the committee to the publications of the World Health Organization in which can be found a tremendous amount of evidence from all countries to substantiate the view, as I said earlier, that the history of physical medicine starts off to foster that end which was desirable.

Later on people came to realize that certain organs of the body do not exist in isolation but are part of a system. You cannot remove them without altering other organs of the system and as there are many organs which are interrelated, if you remove one then you interfere with the system as a group. And later they realized that you cannot understand illness until you take into consideration the mental attitude of the individual and the special surroundings, so as to determine his emotional side. So you cannot understand an illness until you know exactly the physical symptoms as well as the mental symptoms and the social stresses and strains which the individual has.

Every human being sees the world a little differently and it is impossible for an untrained observer to understand what is in the eyes of another person. We spoke about capital punishment as a deterrent but it is impossible for an outside observer to say whether it is a deterrent for one individual or not unless he has an opportunity to go over with that individual all his thoughts and feelings about it. There is no conclusive evidence at all that capital punishment is a deterrent. That seems on the surface to be a reasonable statement, but there is no scientific evidence.

Mr. Fulton: Unless some person were to say that he was deterred by it.

Dr. MacLeod: He could not prove that because the act had not yet been committed.

Hon. Mrs. Hodges: If he were deterred, it would not be committed.

Dr. MacLeod: There is no way of proving it scientifically.

Mr. Shaw: Quite frequently a criminal may emerge out of a family of five or six; five of them being 100 per cent all right and the sixth being a criminal type.

Dr. MacLeod: Yes.

Mr. Shaw: Would you care to comment on that?

Dr. MacLeod: I think that is what we are trying to do now in this research work. One of the most interesting things is to study why it is that when two individuals are faced with a similar situation, one individual will overcome it and be the better as a result of it, while another individual will break down. Nobody knows all the factors concerned. If you put an individual under stresses or strains for example, some of those juvenile delinquent children will not respond to corporal punishment of any type whatsoever. All it will do is to make them harsh and against society. The punishment must be carried on to a point where it is physically destructive before it will affect them, while those who respond to it very seldom carry out the crimes for which it is given, and those who have got physical punishment for carrying out those crimes are rarely affected by it. But there is no clear-cut knowledge

yet as to why it is that one person is able to meet a situation and overcome it and be healthy while another person is not. We know the problem.

When the germ theory came in it was thought to be a very simple thing that if a germ gets into the body the person is ill. Then we realized that if you put the same germs into three people, one would get ill and die while another would not get ill at all while a third would get ill and not die. The problem is that you may have three children suffering from great emotional stress and strain and the next step is: How is it some can have emotional stress and strain and not break down and never reflect it. We are just beginning to find out what environment in mental medicine means. We have a pretty good knowledge that the person who is not given proper mental and maternal care will tend to show a deficiency disease which shows up in the child's inability to conform to the community standards of morality and behaviour in relation to other children.

Mr. SHAW: These people were from the same area and were raised in the same home and subject to the same influences, generally.

Dr. MACLEOD: Nearly always we find that if you study them carefully they were not raised with the same kind of stimulus; but what is it that brings about an overwhelming trend in the case of one person and not in the case of another.

Mr. WINCH: Is it correct to say that for some psychological reason the second or third child in a family is more apt to be anti-social than is the first?

Dr. MACLEOD: There has been a lot of work done, but that work has not been conclusive as yet. It is in the active stage of investigation. The medical field is not yet satisfied with any of the experimental results that have come forward; but the evidence which has accumulated would indicate that all of these factors are important. The attitude now is that there is not any one single cause, and that it is not true in the case of just one germ or one experience in life; it is the total picture that we must take from infancy to adulthood.

Mr. FULTON: I wonder if Dr. MacLeod would care to offer any opinion based upon conversations with criminals, although not murderers, and whether they said to him that one of the reasons that anyone gives that he would not carry a gun at all is that it might be that he would go into a bank and use that gun although he did not intend to do so when he went out to commit a crime; or that the "trigger-happy" individual might use it and therefore for some reason, far beyond possible conclusions, namely that the death sentence it would act as a deterrent in one case and not in another, and that it would prevent a crime from being committed. Have you information based on actual conversations with people who were of the criminal type in that they had committed crimes? Would that be psychologically sound? One of the reasons why in one case they would not associate with what they call a "trigger happy" criminal, and in another case would not carry a gun was for fear that given the right circumstances, or wrong circumstances, they might become panicky and use that gun although they had not intended to when they went out to commit the crime. On the other set of circumstances because the "trigger happy" individual might use it, and for the same fear of the possible circumstances, namely the death sentence, they would not carry the gun or associate with the "trigger happy" criminal in the joint enterprise. That, they told us, was based on conversations with criminals. Would that be, in your opinion, psychologically sound?

Dr. MACLEOD: I have spoken to criminals myself who have put these views forward, but some of these murders are carried out in a moment of impulse and the individual recovers pretty quickly after the murder. I have also asked myself, if the death sentence were not mandatory, how many of these

individuals would have given themselves up afterwards voluntarily if it only was a sentence of life. If the punishment is death, once they have committed a murder, there is no sense of being caught. They might just as well kill again to avoid it.

Mr. FULTON: Going back to the question I asked for your comment on, with regard to the statement of other witnesses, would it be your opinion that in the conversations which were reported these criminals were stating what you would regard to be a rational thing or were they in effect inventing this?

Dr. MACLEOD: I think your point is fair. Only an individual may say he will do something but his actions disprove it. If you sent around somebody on a survey, they would speak of beauty and goodness and say that certainly they believe in that, but if you study practices rather than attitude, you find a different picture. People really mean it, but human beings' behaviour is determined by social conditions and when they find themselves in a certain situation they act altogether differently than they think they would. If they start thinking and if they become emotionally excited they start forgetting some of these ideas. We have cases of individuals who would say this thing when alone and be emphatic about it, but I do not think there is any evidence to show that these people so to speak would have avoided getting into relationships with other people for the commission of a crime if the social condition permitted it. That is if they found themselves being encouraged that this was an easy job to do and there was no intention of killing the person. However, there is no doubt that there is evidence which would suggest that certain killers would be deterred in so far as they would not go along with a well known trigger-happy person but there are relatively few because most people commit crimes in an unpremeditated way. The number of people who really commit a murder are often people who do it—

Mr. FULTON: In the heat of passion.

Dr. MACLEOD: Yes, or under abnormal functioning of the mind. That is, when they are in a group and think it is easy to get away with it, some of these things drop to the side and I have spoken to criminals who have been caught and they have pointed out that all their good advice has fallen to the wayside when it came to the actual time. They never thought, so to speak, that this would happen. I think on this question of constructive malice that it would be quite impossible for a well-meaning criminal to know when he was with a trigger-happy person because that person can appear absolutely normal before he has the reputation and might be one of these people who were mentally ill and would not show it until they were very hungry or depressed or something like that and in such cases throw reason to the wind. I do not think there is any evidence, although one would have to say there is common sense which would indicate that there are a certain number of people.

Mr. WINCH: Dr. MacLeod started to give us an answer this morning and I think it would clear our minds if he would explain in this kind of a study and analysis just what is the difference between the field of psychiatry, psychology and sociology. What is the difference in the application and analysis?

Dr. MACLEOD: It is a question that psychiatrists, psychologists, and sociologists would differ in. At the moment a psychiatrist would consider himself competent to deal with the diagnosis and treatment of mental and physical illness. He must be a doctor first with full medical training. A psychologist would be more concerned with a persons' mental condition, and would give psychometric tests and offer vocational guidance, etc. A sociologist might be any one of the people; a sociologist could be a person with different backgrounds, he might be a psychiatrist, or a psychologist, an anthropologist, or anything. He is interested in how people act as members of the social group.

Hon. Mrs. HODGES: He might be either of them.

Dr. MacLeod: Yes. There is the suggestion that the social scene is so complex that no one man can deal with it and that you have to have a team. On that team there would be a psychiatrist, a psychologist, a sociologist, an anthropologist, a minister, and the whole group would tackle the problem.

The Presiding Chairman: I hesitate to draw this meeting to a conclusion.

Hon. Mrs. Fergusson: Mr. Borins spoke of a sermon by Mr. Macdonald and if it is available could we have it filed?

Mr. Borins: I am glad that you mentioned that because I intended to suggest that it should be filed.

The Presiding Chairman: We will submit this to the Subcommittee on Agenda and Procedure.

Hon. Mrs. Fergusson: Yes.

The Presiding Chairman: I believe that the Canadian Welfare Council may have a further submission to make with respect to lotteries and corporal punishment at a later meeting and we will have the opportunity of having them before us again.

May I, on behalf of the committee, extend to you gentlemen our very sincere thanks for the presentations you have made here today and the assistance which you have given this committee.

Tomorrow we will meet at 4 o'clock when we will have a sheriff who has supervised certain hangings and a jail physician who has been in attendance at hangings on more than one occasion.

APPENDIX

ERLE STANLEY GARDNER
RANCHO DEL PAISANO
TEMECULA, CALIFORNIA

APRIL 20, 1954.

A. Small, Esq.,
Clerk of the Joint Committee on Capital
and Corporal Punishment and Lotteries
House of Commons
Ottawa, Ontario, Canada.

Dear Mr. Small:

I am very much interested in your letter of April 8th, sent to me care of Argosy Magazine, and then forwarded to me here in California.

As a member of Argosy's "Court of Last Resort" I have had quite a bit of experience with cases in which there undoubtedly have been miscarriages of justice.

Jurors are not infallible. The *percentage* of error in this country is small but nevertheless the *numbers* are large.

I have made no firsthand investigation of the administration of justice in Canada and for that reason am in no position to draw any conclusions that would be applicable to conditions in your country. I have made some first-hand investigation in England, spending some time with the British Home Office, and a visit to Scotland Yard which was followed up by a series of interesting meetings with one of the Superintendents of the Yard while he was on a visit to this country, and several meetings with Sir Arthur Dixon of the British Home Office while he was in the United States.

I think generally the chances for a miscarriage of justice are much greater in the United States than in England. For one thing the sheer volume of crime in this country keeps our police forces perpetually overworked and understaffed. Moreover, in many instances the fact that police salaries lag far behind the spiraling cost of living means that we have an occasional investigative blunder and quite frequently a failure to appreciate, correlate and interpret evidence.

Moreover, our newspaper system inevitably exerts a certain amount of pressure on the police.

Take the case of Silas Rogers. (I am sending you under separate cover the latest paper-backed edition of my book, "The Court of Last Resort" which contains a discussion of these cases and which I trust may be of some interest to you and perhaps to your committee.) The police arrested Silas Rogers as a suspect. Quite evidently they picked him up to hold for further investigation but had no great hope of connecting him with the crime. However, developments during the next few hours saw two persons (who had no connection with each other, against each of whom, however, there was a significant amount of tangible evidence) slip through the fingers of the police, leaving Rogers as the only one they had been able to catch.

Every bit of evidence they had against Rogers was the fact that he was a Negro wearing a white cap and the murderer was a Negro who was supposed to have been wearing a white or light-colored cap.

A police officer had been murdered. The newspapers were demanding action. Under the pressure of our journalistic system *a* suspect became *the* suspect, and eventually the defendant.

Silas Rogers was innocent. He was wrongfully convicted of murder, was sentenced to death, the sentence was commuted to life imprisonment, and finally he was pardoned.

Nor can we say that there is any such thing as a "dead-open-and-shut case". Take the case of William Marvin Lindley, for instance, which is a case I personally investigated and which furnished the inspiration for the start of the Court of Last Resort.

Lindley was convicted of a sex murder in northern California. He was identified by an eyewitness. He was supposedly identified by the dying declaration of the girl. The circumstantial evidence was against him. He tried to prove an alibi which blew up for the crucial fifteen or twenty minutes during which the crime was being committed.

Perhaps the most damning evidence against Lindley was the testimony of a sheepherder on the other side of the river who, while tending his sheep, had watched Lindley in the bushes observing three girls in swimming. This eyewitness testified to seeing Lindley attack one of the girls (the one who was found in a dying condition at the scene of the attack).

However, it subsequently appeared that this sheepherder, who identified Lindley, whose identification had been partly based on the color of clothes and hat, was color-blind. He described the murderer as wearing tan clothes and hat, and because Lindley wore tan clothes and a tan hat the description seemed to fit. It subsequently turned out, however, that the witness would describe vivid blue as tan, and bright orange as tan. In fact there was a whole collection of colors which he referred to as tan. It was, he explained afterwards, his favorite color.

After I started my investigation I was able to prove from the transcript that at a time when the murderer had unquestionably been standing in the bushes watching the three girls in swimming, Lindley had actually been riding in an automobile with *the father of the murdered girl.*—Yet a cursory reading of the transcript made such a damming case against Lindley that there seemed absolutely no possibility of his being innocent. The jury had convicted him, the case had gone before the California Supreme Court, and that Court, after studying the transcript, had confirmed the conviction.

Frankly, I am not at all familiar with the situation in Canada. In this country I feel that we need a good overhauling of our whole system of criminal laws. I feel that we need something which is the equivalent of the British Home Office, which has the right, when it desires, to review questions of fact as well as questions of law. Too many innocent people are convicted and far too many guilty people are acquitted.

If I can give you any further information concerning cases mentioned in "The Court of Last Resort" or any other matter which I have investigated here, I will be only too glad to do so.

Sincerely yours,

(Signed) ERLE STANLEY GARDNER

OTTAWA, Ontario,

April 8, 1954.

PERSONAL

Mr. Erle Stanley Gardner,
c/o Argosy's "Court of Last Resort",
205 East 42nd Street,
New York 17, N.Y.

Dear Mr. Gardner:

A Joint Parliamentary Committee of the Senate and the House of Commons of Canada has been established "to inquire into and report upon the questions whether the criminal law of Canada relating to (*a*) capital punishment, (*b*) corporal punishment or (*c*) lotteries should be amended in any respect and, if so, in what manner and to what extent".

The Joint Committee in its inquiries respecting capital punishment is seeking sources of information on whether or not capital punishment is to be abolished in Canada. In this connection it has been suggested that you, or other sources you may suggest, might assist and contribute factual material to the Joint Committee in respect of murder cases in the United States of America where the accused was later proven innocent and, in particular, where innocence was proven after the sentence was fully served or execution carried out.

Should you also be willing to appear before the Joint Committee in Ottawa to elaborate on the foregoing and submit to questioning, could you provide in an early reply:

1. A brief preliminary summary indicating the nature and extent of any factual information or material that you or others could present;
2. An indication of the terms and conditions that would be satisfactory with respect to an appearance in Ottawa; and
3. A rough indication as to when, during May or early June, such an appearance could be arranged (The Committee meets twice-weekly on Tuesdays, Wednesdays or Thursdays for daily sessions approximating two hours).

Respectfully yours,

A. SMALL,
Clerk of the Joint Committee on Capital and Corporal Punishment and Lotteries.